No. 08-539
Title: Republic of Iraq, et al., Petitioners
v.
Robert Simon, et al.
Docketed: October 23, 2008
Lower Ct: United States Court of Appeals for the District of Columbia Circuit
Case Nos.: (06-7175)
Decision Date: June 24, 2008
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 12 2008	Application (08A228) to extend the time to file a petition for a writ of certiorari from September 22, 2008 to October 22, 2008, submitted to The Chief Justice.
Sep 12 2008	Application (08A228) granted by The Chief Justice extending the time to file until October 22, 2008.
Oct 22 2008	Petition for a writ of certiorari filed. (Response due November 24, 2008)
Nov 24 2008	Brief of respondents Robert Simon, et al. in opposition filed.
Dec 10 2008	DISTRIBUTED for Conference of January 9, 2009.
Dec 10 2008	Reply of petitioners Republic of Iraq, et al. filed. (Distributed)
Dec 17 2008	DISTRIBUTED for Conference of January 9, 2009.
Dec 19 2008	Supplemental brief of respondents Robert Simon, et al. filed. (Distributed)
Jan 9 2009	Petition GRANTED the case is consolidated with No. 07-1090 and a total of one hour is allotted for oral argument. The briefs of petitioners are to be filed on or before Thursday, February 19, 2009. The briefs of respondents are to be filed on or before Wednesday, March 18, 2009. Reply briefs, if any, are to be filed in accordance with Rule 25.3 of the Rules of this Court.
Feb 19 2009	Joint appendix filed (2 volumes). Statement of costs received. VIDED.
Feb 19 2009	Brief of petitioners Republic of Iraq, et al. filed. VIDED.
Feb 23 2009	SET FOR ARGUMENT ON Monday, April 20, 2009.
Feb 26 2009	Brief amicus curiae of United States filed. VIDED.
Mar 9 2009	Record received from the U.S.C.A. for the District of Columbia. (1 box)
Mar 13 2009	DISTRIBUTED. VIDED.
Mar 18 2009	Brief of respondents Jordan Beaty, et al. filed. VIDED. (Distributed)
Mar 18 2009	Brief of respondents Robert Simon, et al. filed. VIDED. (Distributed)
Mar 20 2009	Brief amici curiae of James S. Vine, et al. filed. (Distributed)
Mar 24 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Mar 24 2009	Brief amicus curiae of Center for Justice and Accountability filed. (Distributed)
Mar 25 2009	Brief amicus curiae of Human Rights Committee of the American Branch of the International Law Association filed. (Distributed)
Mar 25 2009	Brief amicus curiae of Dr. Stephen Neale filed. (Distributed)
Mar 25 2009	Brief amicus curiae of Tortured American Prisoners of War filed. (Distributed)
Mar 25 2009	Brief amicus curiae of Plaintiffs in Peterson v. Islamic Republic of Iran, CA 01-2094 (RCL), 01-2684 (RCL) United States District Court for the District of Columbia filed. (Distributed)

Mar 25 2009	Brief amici curiae of Dr. Louis Fisher and Dr. Robert J. Spitzer filed. (Distributed)
Mar 25 2009	Brief amici curiae of St. Mary's University School of Law, et al. filed. (Distributed)
Mar 25 2009	Brief amici curiae of Eleven Members of Congress, et al. filed. VIDED. (Distributed)
Mar 25 2009	Motion for divided argument filed by respondents. VIDED.
Apr 1 2009	Response to motion of the Solicitor General filed by respondents.
Apr 6 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 6 2009	Motion for divided argument filed by respondent DENIED.
Apr 10 2009	Reply of petitioners Republic of Iraq, et al. filed. VIDED. (Distributed)
Apr 13 2009	Supplemental brief of respondents filed. VIDED. (Distributed)
Apr 14 2009	Motion to strike supplemental brief of respondents filed by petitioners Republic of Iraq. VIDED.
Apr 14 2009	Motion DISTRIBUTED for Conference of April 17, 2009.
Apr 17 2009	Motion to strike brief filed by petitioners GRANTED.
Apr 20 2009	Argued. For petitioners: Jonathan S. Franklin, Washington, D.C.; and Douglas Hallward-Driemeier, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondents: Thomas C. Goldstein, Washington, D.C.

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Supreme Court, U.S.
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08-539 OCT 22 2008

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No. 08-___

IN THE
Supreme Court of the United States

REPUBLIC OF IRAQ, et al.,
Petitioners,
v.

ROBERT SIMON, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Republic of Iraq possesses sovereign immunity from the jurisdiction of the courts of the United States in cases involving alleged misdeeds of the Saddam Hussein regime predicated on the now-repealed state sponsor of terrorism subject matter exception to immunity of former 28 U.S.C. § 1605(a)(7).

PARTIES TO THE PROCEEDINGS

Petitioners are the Republic of Iraq and Jalal Talibani in his official capacity as President of Iraq. Pursuant to S. Ct. R. 35.3, President Talibani has been substituted for Saddam Hussein, who was named as a defendant below but is now deceased. The Iraqi Intelligence Service ("IIS") was also a named defendant, but it has since been dissolved. *See* Coalition Provisional Authority Order No. 2 (May 23, 2003) (available at www.iraqcoalition.org/regulations/20030823_CPAORD_2_Dissolution_of_Entities_with_Annex_A.pdf). To the extent the former IIS nevertheless remains a party, this petition is filed on its behalf as well.

Respondents were the plaintiffs/appellants below: Robert Simon, Francoise Simon, Robert Alvarez, Roberto Alvarez, Islamic Society of Wichita (substituted for Nabil Seyam), Ahmad Seyam, Yusef Seyam, Melissa Seyam, and Carrie Seyam.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Republic of Iraq et al. ("Iraq") respectfully petition this Court for a writ of certiorari to review the judgment in this case.

OPINIONS BELOW

The opinion of the D.C. Circuit is reported at ___ F.3d ___ and is reproduced at page 1a of the appendix to this petition ("App."). The opinion of the District Court is reported at __ F. Supp. 2d __ and reproduced at App. 23a.

JURISDICTION

The judgment of the D.C. Circuit was entered on June 24, 2008. App. 23a. On September 12, 2008, the Chief Justice extended the time for filing this petition to October 22, 2008. App. 56a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the relevant statutes is set forth in the appendix to this petition. App. 58a.

INTRODUCTION

This petition is sister to the petition pending before this Court in *Republic of Iraq v. Beaty*, No. 07-1080. Both seek review of decisions of the United States Court of Appeals for the District of Columbia Circuit that gravely impact the national security interests of the United States in Iraq. In the event the Court does not consider the issues in *Beaty* alone, the twin petitions should be considered jointly. If the Court rules in *Beaty* that either the President's national security waiver under the Emergency Wartime Supplemental Appropriations Act of 2003

or the enactment of the National Defense Authorization Act for Fiscal Year 2008 ("NDAA") and waiver issued under that statute terminated all pending lawsuits against the Republic of Iraq for lack of subject matter jurisdiction, that ruling would be dispositive of the issue raised by this petition. Alternatively, these issues could be considered jointly in both cases

STATEMENT OF THE CASE

1. **The Complaints.** According to the complaints, plaintiffs Robert Simon, Roberto Alvarez, and Nabil Seyam (now deceased) were taken prisoner by the former Iraqi regime during the First Gulf War. Mr. Simon and Mr. Alvarez were detained in 1990 and were released six weeks later. First Amended Complaint ¶¶ 23, 37, *Simon* v. *Rep. of Iraq*. Mr. Seyam was detained in 1991 and released eighteen days later. Second Amended Complaint ¶¶ 9, 15, *Seyam* v. *Iraq*.

At that time, Iraq possessed absolute sovereign immunity from such claims. But in 1996, Congress amended the Foreign Sovereign Immunities Act ("FSIA") to add 28 U.S.C. § 1605(a)(7) ("former Section 1605(a)(7)"). That statute deprived countries designated as state sponsors of terrorism (which then included Iraq) of immunity for certain claims that might arise under state law. In 2003—more than 12 years after the underlying events and nearly seven years after the enactment of Section 1605(a)(7)—these plaintiffs and family members filed suit against Iraq under that provision seeking more than $243 million in compensatory and

punitive damages as a result of alleged mistreatment by forces of the prior regime.[1]

2. **The EWSAA.** Shortly after a U.S.-led coalition deposed the Saddam Hussein regime, Congress enacted the Emergency Wartime Supplemental Appropriations Act of 2003 ("EWSAA"), Section 1503 of which gave the President the authority to "make inapplicable with respect to Iraq" a specific sanctions law as well as "any other provision of law that applies to countries that have supported terrorism." Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579 (2003).

In May 2003, President Bush issued Presidential Determination No. 2003-23, which lifted various sanctions against Iraq and expressly exercised his EWSAA authority to make inapplicable with respect to Iraq "*any* * * * provision of law" applying to countries that have supported terrorism. 68 Fed. Reg. 26,459 (May 7, 2003) (emphasis added). The President confirmed to Congress that this included rendering inapplicable with respect to Iraq former Section 1605(a)(7), which was the asserted and only conceivable basis for subject matter jurisdiction in this case. *Message to the Congress*, 39 Weekly Comp. Pres. Doc. 647, 647-48 (May 22, 2003).

That determination should have rendered Iraq once again immune from the jurisdiction of the courts of the United States in this and similar cases, just as Iraq was immune when the acts at issue were

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[1] In May 2005, the trial judge consolidated the *Simon* and *Seyam* cases with another similar case on his docket, *Vine* v. *Republic of Iraq*, No. 01-CV-2674, which remains pending in the District Court.

allegedly committed. Pursuant to 28 U.S.C. § 1330(a), federal subject matter jurisdiction over foreign sovereigns exists only if "the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement." Because Section 1605(a)(7) was the only exception to sovereign immunity asserted to be applicable to Iraq in this case, and because the President made that statute inapplicable pursuant to authority granted by Congress, there was no longer any basis for subject matter jurisdiction. Federal courts must dismiss cases, sua sponte or otherwise, whenever subject matter jurisdiction lapses or is withdrawn. See *Ex Parte McCardle*, 74 U.S. 506 (Wall.) (1868).

Invoking the authority of the International Emergency Economic Powers Act, as amended (50 U.S.C. 1601 et seq.), on May 22, 2003, the President issued Executive Order 13,303, in which he declared that the threat of judicial process against Iraqi assets "obstructs the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq." 68 Fed. Reg. 31,931 (May 22, 2003). The President declared that "[t]his situation constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States[.]" *Id.*

The Order prohibited attachments against numerous Iraqi assets. And the President further declared that it is "[a] major national security and foreign policy goal of the United States" to ensure that all "Iraqi resources"—not merely those that

were the main subject of the Executive Order—are dedicated to reconstruction of Iraq and "other purposes benefiting the people of Iraq." 39 Weekly Comp. Pres. Doc. at 647. He explained that he had taken certain actions—specifically including making Section 1605(a)(7) inapplicable to Iraq—to protect Iraqi property from judicial process, which "jeopardiz[ed] the full dedication of such assets to purposes benefiting the people of Iraq." *Id.* at 647-48. Thus, given that Section 1605(a)(7) was the only potential basis for subject matter jurisdiction in this case, the President confirmed that this case, and others like it, pose the threat to national security and foreign policy that he had identified.

Thereafter, in August 2003, the United States filed a Statement of Interest in the *Vine* case (which was later consolidated with these cases) urging dismissal for lack of subject matter jurisdiction on the ground that the President's EWSAA Determination had validly restored Iraq's sovereign immunity.

3. **Acree.** On June 4, 2004, the D.C. Circuit decided *Acree* v. *Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004). Although Iraq was also the named defendant in that case, *Acree* involved different plaintiffs and different claims from the present case, and Iraq did not appear in *Acree* either in the District Court or the D.C. Circuit. Instead, the United States intervened to appeal a $959 million default judgment that had been entered against Iraq, arguing that the President's determination to render Section 1605(a)(7) of the FSIA inapplicable to Iraq—and thus restore Iraq's sovereign immunity—was a valid exercise of his EWSAA authority.

A panel of the D.C. Circuit rejected that argument. Even though Section 1503 of the EWSAA expressly authorized the President to make inapplicable with respect to Iraq "*any* * * * provision of law that applies to countries that have supported terrorism," (emphasis added), and even though Section 1605(a)(7) was a provision of law that applied *only* to countries that have supported terrorism, the panel interpreted Section 1503 narrowly to include only "legal restrictions on assistance and funding for the new Iraqi Government." *Acree*, 370 F.3d at 57.

But even the majority found that this was an "exceedingly close question," *id.* at 51, and its conclusion was disputed by then-Judge Roberts. As he explained, the EWSAA language "'[a]ny other provision' should be read to mean 'any other provision,' not, as the majority would have it, 'provisions that present obstacles to assistance and funding for the new Iraqi government.'" *Id.* at 60 (citation omitted).

The panel nevertheless vacated the entire judgment against Iraq on other grounds. Because the judgment was vacated, there was no opportunity for the United States to seek *en banc* or Supreme Court review of the panel majority's subject matter jurisdictional holding on the EWSAA issue.

The issue returned to the D.C. Circuit in the *Beaty* case, which is now pending on a petition for certiorari in this Court. In *Beaty*, Iraq filed a petition for initial hearing *en banc*, urging the D.C. Circuit to reconsider and overrule *Acree*. The United States filed an amicus brief urging that the petition for initial *en banc* review be granted. The

Court of Appeals denied the petition for initial hearing *en banc*, although Judges Kavanaugh and Brown, however, dissented from that order. See Order, *Rep. of Iraq v. Beaty*, No. 07-7057 (D.C.Cir. Nov. 6, 2007). The D.C. Circuit then summarily rejected Iraq's position on the merits, relying on *Acree*, and Iraq has petitioned this Court for review of that decision in No. 07-1090.

4. **Proceedings In The District Court.** On July 20, 2004, before Iraq moved to dismiss the complaints in these cases, the trial judge held, in the related *Vine* case, that *Acree* was binding on the question of whether the President's EWSAA determination had restored Iraq's sovereign immunity. *See* Memorandum and Order, *Vine* v. *Republic of Iraq*, No. 01-CV-2674 (D.D.C. July 20, 2004).

On September 6, 2006, after it had consolidated the *Simon*, *Seyam*, and *Vine* cases, the District Court concluded that it possessed subject matter jurisdiction under former Section 1605(a)(7), but dismissed Respondents' cases as outside the statute of limitations. App. 38a-48a.[2]

5. **The NDAA.** Plaintiffs appealed the dismissal of their claims to the D.C. Circuit, which heard argument in October 2007. Prior to a decision, however, Congress enacted Section 1083 of the

[2]The court dismissed the claims of the *Simon* and *Seyam* plaintiffs as barred by the 10-year statute of limitations because plaintiffs' causes of action had accrued by December 1990 at the latest, but plaintiffs waited more than twelve years to file suit. App. 38a-48a. The court rejected the plaintiffs' contentions that the expiration of the statute of limitations should be excused because Iraq was immune from suit for part of that period, from December 1990 until the enactment of former Section 1605(a)(7) in April 1996.

National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), which repealed the subject matter jurisdiction over plaintiffs' claims.

On December 14, 2007, Congress passed the initial version of the NDAA, whose main purpose was to authorize funding for the military. Section 1083 of that bill, however, contained new jurisdictional, liability, and other provisions for litigation against current and former state sponsors of terrorism.

Section 1083 had originally been introduced as an amendment on the Senate floor, and there were no hearings or substantive debates on it. In particular, Section 1083(c)(4) was an entirely new provision inserted in conference committee with no debate or even identification of its sponsor. *Compare* H.R. Rep. No. 110-477, at 338-344 (2007) *with* 153 Cong. Rec. S12631-32 (daily ed. Oct. 3, 2007).

On December 28, 2007, the President vetoed the entire NDAA solely because of Section 1083's application to litigation against Iraq. The President explained that Section 1083, if allowed to become law, "would undermine the foreign policy and commercial interests of the United States." *Memorandum of Disapproval*, 3 Weekly Comp. Pres. Doc. 1641 (Dec. 28, 2007).

Following the veto, Congress swiftly reenacted a new NDAA. Section 1083 expressly repealed former 28 U.S.C. § 1605(a)(7), the statute invoked as the basis for subject matter jurisdiction in this and other cases against Iraq. *See* NDAA, § 1083(b)(1)(A)(iii) ("Section 1605 of title 28, United States Code, is amended * * * in subsection (a) * * * by striking paragraph (7)"). In its place, Congress enacted a

new subject matter jurisdiction exception to immunity for state sponsors of terrorism, now codified at 28 U.S.C. § 1605A(a)(1) ("Section 1605A(a)(1)"). *See* NDAA, § 1083(a). Repeal of Section 1605 (a)(7), ipso facto, defeated subject matter jurisdiction in federal courts over all cases pending against Iraq.

Insofar as it provides a new basis for subject matter jurisdiction, Section 1605A(a)(1) is largely consonant with former Section 1605(a)(7). Any complaint that invoked subject matter jurisdiction under the repealed statute could theoretically be re-filed under the new statute. The reenacted version of the NDAA, however, contained a new provision, Section 1083(d)(1), which authorized the President to "waive any provision of [Section 1083] with respect to Iraq, insofar as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof."

In order to issue such a waiver, the President must determine that a waiver is "in the national security interest of the United States" and would "promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq," and that "Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism." NDAA, § 1083(d)(1). Congress provided that the waiver will apply to pre-enactment conduct and regardless of the extent to which it affects pending cases. *Id.* § 1083(d)(2). Section 1083(d)(4) also states the "sense of Congress" that the President "should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims

based on terrorist acts committed by the Saddam Hussein regime" that "cannot be addressed in courts in the United States due to the exercise of the waiver authority under paragraph (1)." *Id.* § 1083(d)(4).

On January 28, 2008, the President exercised his authority to waive "all provisions of section 1083 of the Act with respect to Iraq and any agency or instrumentality thereof." Presidential Determination No. 2008-9, 73 Fed. Reg. 6571 (Feb. 5, 2008). This waiver necessarily included the entirety of 28 U.S.C. § 1605A, which was added by Section 1083(a).

The President made all of the determinations required by Section 1083(d)(1). He also determined that Section 1083 may adversely affect Iraq "by exposing Iraq or its agencies or instrumentalities to liability in United States courts and by entangling their assets in litigation." *Id.* The President concluded that "[s]uch burdens would undermine the national security and foreign policy interests of the United States." *Id.* at 6573.

These burdens, in the President's view, included "a potentially devastating impact on Iraq's ability to use Iraqi funds to expand and equip the Iraqi Security Forces, which would have serious implications for U.S. troops in the field acting as part of the Multinational Force-Iraq and would harm anti-terrorism and counter-insurgency efforts." *Id.* at 6574. The President also determined that applying Section 1083 to Iraq "will hurt the interests of the United States by unacceptably interfering with political and economic progress in Iraq that is critically important to bringing U.S. troops home," and "would redirect financial resources from the continued reconstruction of Iraq and would harm

Iraq's stability, contrary to the interests of the United States." *Id.* at 6574-75. He further stated that "[t]he economic security and successful reconstruction of Iraq continue to be top national security priorities of the United States" and that Section 1083 "threatens those key priorities." *Id.* at 6571.

6. **The D.C. Circuit's Decision.** Following the President's waiver, the D.C. Circuit *sua sponte* directed the parties to submit simultaneous briefs of no more than 15 pages, addressing the effect, if any, of the NDAA and the waiver on this case, specifically including "whether pending cases filed under former 28 U.S.C. § 1605(a)(7) may proceed on the basis of that provision." Order, *Simon* v. *Republic of Iraq*, Nos. 06-7175, 06-7178 (D.C. Cir. Feb. 4, 2008).

In its brief, Iraq contended that the NDAA and waiver confirmed the lack of subject matter jurisdiction in this case because the NDAA (1) repealed the jurisdictional basis for these cases—former Section 1605(a)(7)—and (2) replaced it with a new jurisdictional provision—28 U.S.C. § 1605A(a)(1)—which the President waived as to Iraq pursuant to express statutory authority.[3] The court allowed no responsive briefing, and held no argument on this issue.

On June 24, 2008, a three-judge panel of the United States Court of Appeals for the District of

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[3] Despite *Acree*, Iraq had previously urged to the D.C. Circuit in this case that the EWSAA presidential waiver terminated subject matter jurisdiction over respondent's claims. *See* Brief of Appellee at 51-53 (D.C.Cir. filedJune 18, 2007. Iraq reiterated that position in its supplemental brief . *See* Brief of Appellee Republic of Iraq in Response to Court's Order of Feb. 4, 2008 at 7 n.3 (D.C.Cir filed March 14, 2008).

Columbia Circuit concluded that the President's waiver under the NDAA did not disturb pending section 1605(a)(7) litigation involving potentially crippling damages liability against Iraq. The court relied on statutory opacity to infer that Congress intended to apply the repeal of subject matter jurisdiction under Section 1605(a)(7) only prospectively, a highly unusual legislative practice. The panel recognized that its ruling was fraught with great foreign policy consequences: "Cognizant of the President's concerns and of the potential implications of our holding upon the foreign affairs of the United States, we do not lightly conclude that the NDAA leaves intact our jurisdiction over cases, such as these, that were pending against Iraq when Congress enacted the NDAA." App. 62a.

On September 12, 2008, the Chief Justice extended the time for filing this petition. App. 56a.

REASONS FOR GRANTING THE WRIT

This case easily satisfies the criteria for this Court's review. It implicates issues of national and international importance of the highest order that were wrongly decided below. At stake in this case is whether the Republic of Iraq's economic, military, and political reconstruction will be crippled by lawsuits born of Saddam Hussein's terrorism asserting damages liability exceeding $1 billion in United States courts. But equally important, this case threatens to undermine the reciprocity of sovereign immunity between the Republic of Iraq and the United States of America in the respective national courts, evidenced in this and the other Saddam-era terrorism cases brought under the jurisdictional provisions of 28 U.S.C. § 1605(a)(7).

This lack of reciprocity hurts the interests of the United States by unacceptably interfering with political progress in Iraq critically important to bringing U.S. troops home and further harms Iraq's stability, contrary to the interests of the United States, by impeding the ability of the United States and Iraq to conclude a Memorandum of Understanding (MOU) or Status of Forces Agreement (SOFA) governing United States combat troops and contractors in Iraq by December 31, 2008. Without an MOU or SOFA after 2008, United States national security interests in Iraq may be wounded or worse. The time has come for this nation's highest Court to resolve these important issues inflaming relations with a critically important ally of the United States.

I. THIS CASE INVOLVES ISSUES OF EXCEPTIONAL NATIONAL AND INTERNATIONAL IMPORTANCE.

A. The D.C. Circuit's Decision Could Impair Negotiations Between The United States And Iraq Over Terms And Conditions For Extending The United States Military Combat Presence In Iraq.

The decision below compromises the United States war against terror in Iraq; and, confounds the ambition of the United States to conclude either an MOU or SOFA with Petitioner over sovereign immunity issues or otherwise. According to The New Times Senator Carl Levin, chairman of the Senate Armed Services Committee, has warned: "It's critical that our dedicated men and women in uniform in Iraq have full legal protections and are not subject to criminal prosecution in an Iraqi

judicial system that does not meet due process standards." Thom Shanker and Steven Lee Myers, "Draft of Iraq Deal Sets U.S. Pullout by End of 2011, With Some Flexibility," *New York Times*, 18 October 2008, Sec. A, col. 1, p.5. Senator Levin's sentiments have been echoed by Representative Ike Skelton of the House Armed Services Committee: "I am very concerned about reports that U.S. service personnel may not have full immunity under Iraqi law." Mary Beth Sheridan and Karen DeYoung, "U.S., Iraqi Officials Question Terms of Draft Security Deal," *The Washington Post*, 18 October 2008, Sec. a, col. 1, p. 10. On the other hand, *The Washington Post* has reported: "Some political leaders in Baghdad, who got their first look at the controversial agreement to extend the U.S. military presence in Iraq beyond 2008, said it did not go far enough in guaranteeing Iraqi sovereignty." (Id.)

The Iraqi Parliament must approve any MOU or SOFA. But that approval becomes problematic when the United States judiciary does not respect Iraqi sovereignty in a way that corresponds to the immunities the United States enjoys in Iraqi courts. On October 19, 2008, The *New York Times* reported: "Iraqis frequently express mixed emotions, torn between a genuine loathing of being occupied by American troops who have often seemed oblivious to Iraqis' feelings and a recognition of the country's vulnerabilities." Alissa J. Rubin, "Iraqis March In Baghdad To Protest Security Pact," *New York Times*, 19 October 2008, sec. A, col. 1, p. 8. If satisfactory immunity for American forces and contract personnel is not granted in an MOU or SOFA, the consequence would be a pre-mature curtailment of

combat operations in Iraq against undefeated enemies of the United States.

The United States is engaged in an ongoing military operation with the purpose of supporting and strengthening the new democratic government of Iraq and the reconstruction of its country. In the view of both Iraq and the United States, subjecting the sovereign nation of Iraq to lawsuits based on the misdeeds of its prior regime would severely hinder that foreign policy goal and threaten the critical U.S.-Iraqi alliance.

The issue of Iraq's sovereign immunity for the misdeeds of the deposed Saddam Hussein regime potentially impacts at least seven other pending cases against Iraq involving well over $1 billion in asserted liability.[4] Iraq is aware of no other friendly ally of the United States that has ever been subjected to liability in U.S. courts based on the tortious misdeeds of a formerly hostile regime.

This case is also exceptionally important to the United States, as the ruling below has compromised a major U.S. foreign policy goal: U.S. support for the reconstruction of Iraq and its new democratic government.[5] The D.C. Circuit recognized that "the

[4] *See, e.g., Vine* v. *Rep. of Iraq*, No. 01-2674 (D.D.C.) (claims for $400 million); *Acree* v. *Rep. of Iraq*, Nos. 02-632, 06-723 (D.D.C.) (renewed complaint and Rule 60(b) motion seeking to reinstate claims for $959 million); *Lawton* v. *Rep. of Iraq*, No. 02-474 (D.D.C.); *In re Terrorist Attacks on September 11, 2001*, MDL-1570 (S.D.N.Y.) (asserted liability against all defendants of more than $1 trillion); *Beaty v. Rep. of Iraq*, No. 03-215 (D.D.C. claims for more than $2.1 million).

[5] *See, e.g.*, Amy Falls, *Acree* v. *Republic of Iraq: Holding a Fragile, U.S.-Backed Government Civilly Liable for the Wrongdoings of the Previous, Ousted Regime*, 73 Geo. Wash. L.

foreign policy considerations Iraq raises are important, as the President's actions and statements make clear." App. 20a. In issuing his EWSAA determination, the President declared that the threat of judicial process against any Iraqi assets "obstructs the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq" and "constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States[.] 68 Fed. Reg. 31,931 (May 22, 2003). He also made clear that it is "[a] major national security and foreign policy goal of the United States" to ensure that all Iraqi resources are dedicated to reconstruction of Iraq and purposes benefiting the people of Iraq." 39 Weekly Comp. Pres. Doc. at 647.

Indeed, the issue was so important that the United States took the extraordinary step of filing an unsolicited amicus brief in the *Beaty* case in the D.C. Circuit seeking an initial *en banc* review in order to overrule *Acree*. In that brief, the United States stated that the issue of Iraq's sovereign immunity is one of "exceptional and continuing importance." Brief for United States as Amicus Supporting Initial Hearing En Banc ("*Beaty* U.S. Amicus Br.") at 2, *Beaty* v. *Rep. of Iraq*, No. ___ (D.C. Cir. filed July 23, 2007). The United States also has underscored the

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Rev. 880, 893-95 (2005) ("regrettable" decision in *Acree* "lead[s] to truly bizarre and perplexing results, subjecting a country devastated by the U.S. military to potentially billions of dollars of liability in U.S. courts," and thus "directly contradicts current U.S. foreign policy").

importance of that issue in statements of interest filed in the *Beaty* case.[6]

More recently, the President underscored the enormous continuing importance of these issues when he took the extraordinary step of vetoing a massive omnibus defense appropriations bill solely because of the deleterious foreign policy consequences one provision would have had on this and similar lawsuits, and then subsequently waived new Section 1605A as to Iraq. The President determined that "exposing Iraq or its agencies or instrumentalities to liability in United States courts and * * * entangling their assets in litigation" would "undermine the national security and foreign policy interests of the United States," would have "serious implications for U.S. troops in the field," will "hurt the interests of the United States by unacceptably interfering with political and economic progress in Iraq that is critically important to bringing U.S. troops home," would "redirect financial resources from the continued reconstruction of Iraq and would harm Iraq's stability, contrary to the interests of the United States," and would threaten "[t]he economic security and successful reconstruction of Iraq." 73 Fed. Reg. 6571, 6571-74 (Feb. 5, 2008).

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[6] *See* Statement of Interest at 12, 13, 16, *Beaty* v. *Rep. of Iraq*, No. 03-215 (D.D.C. filed Mar. 15, 2004) (EWSAA determination seeks to remove "a serious threat to the crucial foreign policy goal of promptly rebuilding Iraq into a democratic, self-sustaining nation," which would "significantly interfere with the successful establishment of a new, peaceful government," and "stand[s] as an obstacle to achieving the Nation's foreign policy goals").

U.S. foreign policy is thus undermined by the specter of imposing "crushing liability," *Acree*, 370 F.3d at 61 (Roberts, J.), on an allied nation the United States is actively seeking to rebuild and support. But the diplomatic harms go beyond that.[7] Iraq is aware of no other friendly U.S. ally that has ever been subjected to liability in U.S. courts for the alleged misdeeds of a formerly hostile prior regime. Indeed, similar attempts to subject Germany and Japan to lawsuits for their World War II actions have uniformly been rejected.[8] Thus, it is the stated foreign policy of the United States to "preserve plaintiffs' claims * * * pending the establishment of a successor government capable of negotiating the *diplomatic* or other resolution of claims arising from the misdeeds of its predecessor." Statement of Interest at 16 n.9, *Beaty* v. *Rep. of Iraq*, No. 03-215 (D.D.C. filed Mar. 15, 2004) (emphasis added). Claims of this sort between formerly hostile but subsequently allied nations have always been addressed diplomatically rather than through coercive litigation in foreign courts. Iraq should not be treated differently because of the court of appeals' errors.

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[7] *See* Falls, *supra*, at 893 (*Acree* holding "could potentially devastate the already precarious foreign relationship between the United States and Iraq" as "[m]any Iraqis will likely be skeptical of trusting a foreign government that claims to be committed to developing a new and vibrant economy and government in Iraq, yet refuses to forgive that new government and economy from civil liability for the transgressions committed by the previous regime").

[8] *See, e.g.*, *Hwang Geum Joo* v. *Japan*, 413 F.3d 45 (D.C. Cir. 2005); *Princz* v. *Fed. Rep. of Germany*, 26 F.3d 1166 (D.C. Cir. 1994).

In sum, the decision of the court of appeals, if left unreviewed by this Court, could confound or even shipwreck ongoing negotiations and the conclusion of agreements between the United States and Iraq over extending the presence and use of United States military combat troops and auxiliary contract personnel in Iraq past 2008. It seems probable that the current round of negotiations with the Bush administration will culminate in a provisional status of forces Memorandum of Understanding dealing with the immunities of American forces and contractors to the jurisdiction of Iraqi courts. It will probably be followed with a more permanent Status of Forces Agreement or treaty. At present, however, both the MOU and SOFA could be stillborn over the question of the immunity of the United States or its military personnel from the jurisdiction of Iraqi courts. As noted above, Senator Carl Levin, chairman of the Senate Armed Services Committee, and Representative Ike Skelton, of the House Armed Services Committee, have voiced skepticism over anything less than complete United States immunity. The decision below dramatically weakens the hand of the United States in achieving that goal because Iraq would remain fully exposed to huge damage liability awards in United States courts for the misdeeds of Saddam Hussein and his expired regime unless this Court grants certiorari and reverses the judgment below. And if a deal on immunity is not struck between the United States and Iraq soon, the United States combat military mission could be curtailed in Iraq long before victory.

B. The D.C. Circuit's Opinion Threatens To Undermine U.S. Foreign Policy and Reciprocity Between Nations and Impairs Petitioner's Sovereign Dignity Interests.

An effective foreign policy towards Iraq or elsewhere requires that the United States speak with one voice rather than sound like a discordant symphony. As this Court explained in *United States* v. *Curtiss-Wright Export Corporation*, 299 U.S. 304, 319 (1936): "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as representative of the nation." Unity of design is indispensable to foreign policy success. That is why this Court has repeatedly invalidated state laws that undercut the foreign policy established by the federal government. *See*, e.g., *American Insurance Association* v. *Garamendi*, 539 U.S. 396 (2003); *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000). And this Court has been loath to find that Congress has handcuffed the President in blocking lawsuits or otherwise taking economic measures as part of a strategy of negotiating agreements with foreign countries. *See Dames & Moore* v. *Regan*, 453 U.S. 654 (1981).

The decision of the court of appeals, however, creates a Janus-faced foreign policy towards Iraq. On the one hand, the President has established a foreign policy that shields Iraq from damages liability in United States courts for the terrorist acts of its detested predecessor to promote its economic and political reconstruction, and thus its capacity to survive without United States military support. On the other hand, the court of appeals' decision has

established a conflicting foreign policy towards Iraq by exposing the new and friendly government to damage suits in the United States for injuries inflicted by a predecessor enemy regime. That liability exposure cripples the ability of Iraq to defend itself and to succeed in its economic and political reconstruction efforts that the President has championed as central to the national security of the United States. If a judicial decision is to cut a gaping wound in the President's strategy for rebuilding Iraq and removing the United States' combat military involvement, it should not be crafted by a subordinate tribunal.

Petitioner's status as an allied nation-state also militates strongly in favor of granting the writ. Article III, section 2 of the Constitution vests this Court with original jurisdiction over cases "affecting ambassadors" and other "public Ministers and Consuls." Its purpose is to honor the dignity interest of foreign governments or their diplomatic agents by insuring them access to the highest court in the land in the event they are embroiled in litigation. The status of the court should be congruent with the status of the litigants and the importance of the issues at stake. The United States surely expects that it will enjoy equal access to the highest courts in Iraq and other foreign jurisdictions when its critical legal interests are at stake. Reciprocity is a keystone of foreign sovereign immunity. *See National City Bank of New York* v. *Republic of China*, 348 U.S. 356 (1955). This Court thus regularly grants review of cases involving foreign states pivoting on the Foreign Sovereign Immunities Act. *See Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S.

428 (1989). Permitting a lower tribunal to override Presidential determinations by authorizing huge damages liability against an allied foreign state without final review by this Court could well be seen by certain observers in Iraq as an affront, thereby inflaming bilateral relations with a critical foreign sovereign ally of the United States.

C. The D.C. Circuit's Decision Threatens to Alienate the Government of Iraq, the Political Parties of Iraq As Well As The People Of Iraq, And Thus Undermine The War Effort.

To prevail militarily against the insurgency or Al Qaeda in Iraq, the United States must win the hearts and minds of the Iraqi people and have the fullest support of the political branches of the Government of Iraq, including the political parties that hold seats in the Iraqi parliament, the National Council of Representatives. However, the decision of the court of appeals – a co-equal branch of the United States Government – threatens to alienate all by saddling the Government of Iraq and ultimately the people of Iraq with financial responsibility for terrorist crimes perpetrated by the detested dictator Saddam Hussein (who simultaneously oppressed the Iraqi people). The Iraqi people have already displayed their animosity towards Saddam by generally applauding his criminal trial, conviction, death sentence and execution. Yet the D.C. Circuit has now held that the principal victims of Saddam's aggression – the people of Iraq – can now be further victimized for those misdeeds in U.S. courts. The court of appeals' decision – and alarming interference with the

President's war tactics –justifies, simpliciter, review by this Court.

The decision below, if left undisturbed, could be exploited by enemies or opponents of the Government of Iraq in an attempt to destabilize or undermine the government. Whether or not they are correct, such enemies and opponents might point to the decision as support for the accusation that the GOI has not succeeded in becoming an equal sovereign to the United States. The detractors could underscore that the GOI has acquiesced, since the turnover of sovereignty from the Coalition Provisional Authority to the new Government of Iraq on 28 June 2004 through the present, in immunity of the United States of America, the U.S. military and U.S. contractors from suit in Iraqi courts by either the Government of Iraq or Iraqi nationals, and even now still accords almost complete immunity to the United States Government, its military and contractors. They could then assail the Government of Iraq for having tolerated and not eliminated the unequal treatment of the Government of Iraq by U.S. courts asserting "State sponsor of terrorism" jurisdiction under 28 U.S.C. 1605(a)(7) over multi-million dollar private-party damage suits against the Republic of Iraq arising from acts of the former Saddam regime. Such an asymmetrical relationship, these harsh critics may insist, is the continuing unacceptable remnant of a military occupier to a sovereign state. This troublesome potential political ramification of the decision below makes review by this Court correspondingly urgent.

D. The Decision Below Undermines The President's Role As The Principal Arbiter of U.S. Foreign Policy.

The decision of the court of appeals interprets the relevant statutes as if they were provisions of the Internal Revenue Code rather than part of a nimble and flexible national security consensus between Congress and the President. Presidential waiver stipulations like those in the EWSAA and NDAA are staples of national security legislation that enable the nation to opt out of a policy stance in light of ever-changing circumstances that earmark international affairs. *See,* e.g., Iran and Libya Sanctions Act of 1996, P.L. 104-172, 110 Stat. 1541, as amended, section 9; Cuban Liberty and Democratic Solidarity Act, 22 U.S.C. § 6082(h). Presidents would regularly veto foreign policy legislation – even with customary national security waiver language – if it was anticipated that the judiciary would shortchange the waiver by giving a crabbed interpretation of its scope, as was done by the court of appeals regarding the EWSAA and NDAA. This Court should grant review of the decision below to avoid disrupting the role of waiver provisions in national security legislation which facilitates enlightened consensus between the President and Congress.

In the field of national security or foreign affairs, legislative delegations of power are given broader latitude in construction than is true in domestic situations. This Court elaborated in *United States* v. *Curtiss-Wright Export Corp.*, supra, at 320:

> "It is quite apparent that if, in the maintenance of international relations,

> embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."

The decision of the court of appeals slighted that seminal teaching about international relations. It handcuffed the ability of the President to effectuate an economic, military and political reconstruction policy in Iraq by exposing Iraq to potentially crippling damages lawsuits in the United States. This Court should grant review to insure that congressional delegations in foreign affairs are given proper scope.

II. THE D.C. CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S PRECEDENTS.

Review is also warranted because the D.C. Circuit's jurisdictional determinations—whether through the NDAA or the EWSAA waiver are erroneous and conflict with this Court's precedents. The D.C. Circuit's decision rewrites the statutes, undermines U.S. foreign policy, threatens the U.S.-Iraqi alliance, and should not stand unreviewed by this Court.

A. The D.C. Circuit Erroneously Held That A Repealed Statute Confers Jurisdiction Over This Case.

Section 1083 of the NDAA repealed former Section 1605(a)(7) of FSIA—the only asserted or arguable statutory basis for jurisdiction—and replaced it with a new jurisdictional statute—Section 1605A(a)(1)—that the President then waived as to Iraq pursuant to specific Congressional authorization. Accordingly, there is no longer subject matter jurisdiction over this case. "When a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law." *Bruner* v. *United States*, 343 U.S. 112, 116-17 (1952); *see The Assessors* v. *Osbornes*, 76 U.S. 567, 575 (1869) ("Jurisdiction * * * was conferred by an Act of Congress, and when that Act of Congress was repealed the Power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no savings clause, all pending actions fell, as the jurisdiction depended entirely upon the Act of Congress."); Accord *Ex Parte McCardle*, supra.

Congress knows how to amend subject matter jurisdiction but give the amendment only prospective effect. In 1988, for instance, Congress amended the diversity statute, 28 U.S.C. 1332, to increase the amount in controversy requirement, but made the subject matter change effective only as to actions commenced on or after the 180th day beyond the enactment, P.L. 100-172, 102 Stat. 462. Not a single syllable in the NDAA indicates Congress intended to continue subject matter jurisdiction under Section 1605 (a)(7) for pending cases after it

had been repealed. The reason is self-evident. New section 1605A(a)(1) creates subject matter jurisdiction for every case previously pending under the old statute. Thus, subject to the express authorization of the President to waive the new statute as to Iraq, new Section 1605A(a)(1) provides a jurisdictional basis for *every* then-pending case. Indeed, Congress provided detailed transition rules under which all pending cases can be re-filed under the new Section 1605A either after enactment of the NDAA or, if necessary, after a judgment in the original action dismissing the case for want of subject matter jurisdiction.[9]

The plain language of 28 U.S.C. § 1330 also confirms the lack of jurisdiction. That statute provides that "[t]he District Court shall have original jurisdiction . . . of any nonjury civil action against a foreign state . . . with respect to which the foreign state is not entitled to immunity under

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[9] The D.C. Circuit misinterpreted NDAA § 1083(c)(3) as expressing a clear intent to preserve former Section 1605(a)(7) for pending cases. That section allows for re-filing under Section 1605A within 60 days after enactment of the NDAA or entry of judgment in the original action. That Congress provided for refiling after entry of judgment in the original action does not mean that Section 1605(a)(7) must still apply to those actions. First, if Section 1605(a)(7) were the only basis for jurisdiction, there would still be a judgment of dismissal, after which a plaintiff may re-file. Second, and contrary to the D.C. Circuit's view, there may be cases where former Section 1605(a)(7) was not the only jurisdictional basis, either because an additional exception to sovereign immunity applied or because there were additional non-sovereign parties not subject to the FSIA. Those cases could proceed to judgment under the alternative jurisdictional basis, after which a plaintiff may, if it chooses, re-file under new Section 1605A(a)(1).

sections 1605-1607 of this title." 28 U.S.C. § 1330(a). Thus, to sustain continuing jurisdiction over this case, the Court must find that Iraq comes within an exception to sovereign immunity provided by currently-in-force sections 1605-1607 of Title 28 of the United States Code. Because Section 1605(a)(7) has been repealed and because its replacement, Section 1605A(a)(1), has been waived as to Iraq, there is no applicable exception codified anywhere in 28 U.S.C. §§ 1605-1607 and no jurisdiction under 28 U.S.C. § 1330.

Review of the decision below is warranted to correct a marked misapplication of this Court's canons of construction when subject matter jurisdiction is in question.

B. The D.C. Circuit Erroneously Nullified The President's EWSAA Determination.

The D.C. Circuit's *Acree* decision—adhered to in this case—was likewise manifestly erroneous. Section 1503 of the EWSAA is unambiguous. It authorized the President to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or *any other provision of law* that applies to countries that have supported terrorism." Pub. L. No. 108-11, § 1503 (emphasis added). This is exactly what the President did in Determination 2003-23, in which he made inapplicable with respect to Iraq "any * * * provision of law that applies to countries that have supported terrorism." 68 Fed. Reg. 26,459. As he stated, former Section 1605(a)(7) was among the provisions of law he made inapplicable to Iraq, thereby restoring Iraq's sovereign immunity in cases like this. *See* Message to the Congress, 39 Weekly Comp. Pres.

Doc. 21, at 647-48 (May 22, 2003). That action was squarely within the President's EWSAA authority because Section 1605(a)(7) was a "provision of law" that applied *only* to "countries that have supported terrorism."

Instead of giving effect to the broad language of Section 1503 and the President's implementation of his statutory authority, the *Acree* majority read limits into the President's authority that appear nowhere in the statute. First, applying the *ejusdem generis* canon of construction, the majority concluded that the EWSAA only authorized the President to make inapplicable with respect to Iraq "those provisions of law that impose economic sanctions on Iraq or that present legal obstacles to the provision of assistance to the Iraqi Government," which purportedly did not include Section 1605(a)(7). 370 F.3d at 55.[10] Second, the majority relied on the absence of any reference to the FSIA or federal court jurisdiction in the EWSAA legislative history—which the majority itself admitted was "sparse" and "not conclusive"—to conclude that "the general reference in § 1503 to 'other provisions of law that apply to countries that have supported terrorism' embraces only those provisions of law that constitute legal restrictions on assistance to and trade with Iraq." *Id.* at 55, 56.

Then-Judge Roberts cogently explained the majority's key errors. He noted that the expansive language of the EWSAA should be accorded "'broad,

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[10] In fact, Section 1605(a)(7) readily falls within the majority's own characterization of laws covered by Section 1503 of the EWSAA, since Section 1605(a)(7) was a form of sanction imposed on nations that sponsored terrorism.

sweeping application,'" particularly given that Congress had recently passed a similar appropriations statute with a narrower scope, thus showing that "Congress knows how to use more limited language * * * when it wants to." *Id.* at 60 (citation omitted). He also noted that the majority erred in relying on the *absence* of specific references in the legislative history to limit the reach of the statute, stating that "the party seeking to narrow the application of the statute must demonstrate that Congress intended something less than what the law on its face says." *Id.* at 62 (citations omitted). Because the legislative history gives no indication "that Congress did *not* intend to include Section 1605(a)(7) of the FSIA among the 'any other' provisions that the President could render inapplicable to Iraq," Judge Roberts correctly concluded "that the President was authorized to—and did, with the Presidential Determination—oust the federal courts of jurisdiction over Iraq in Section 1605(a)(7) cases." *Id.* at 63.

The *Acree* panel also erred in suggesting, in dicta, that its decision was supported by the limited duration of the President's EWSAA authority to act. 370 F.3d at 56-57. Section 1503 provides that the "*authorities* contained in this section shall expire" if not renewed. Pub. L. No. 108-11, § 1503 (emphasis added). It does not provide that the effect of the President's *actions* would expire where, as here, those actions were taken when the statutory authority was in effect. That is the Executive's understanding, *see Beaty* U.S. Amicus Br. 12-14, and it is correct. The President's 2003 Determination rendering Section 1605(a)(7) inappli-

cable to Iraq was clearly authorized by an existing statute and was thus fully effective.[11]

Nor is it "perplexing," *Acree*, 370 F.3d at 56, that Congress would authorize the President to restore Iraq's immunity for acts done while designated as a state sponsor of terrorism, while Section 1605(a)(7) denies immunity in such situations for other nations. As Judge Roberts explained, "[g]iven the broad language of the EWSAA and the circumstances surrounding its enactment, it is entirely possible—and surely not 'perplexing'—that Congress in 2003 made an *ad hoc* decision to strike a different balance in favor of the new government of Iraq." *Id.* at 61. Indeed, Congress made the same determination in the recent NDAA after the President objected to a lack of any exception for Iraq. The law as enacted imposes onerous provisions on state sponsors of terrorism while expressly authorizing the President to waive those provisions, including the new jurisdictional exception to sovereign immunity in 28 U.S.C. § 1605A(a)(1), as to Iraq.[12]

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[11] The meaning of the EWSAA sunset provision was never briefed by either party in *Acree*.

[12] Section 1083(c)(4) of the NDAA, which purported to state a later Congress' view about Section 1503 of the EWSAA, does not change this result. Because the President *waived* Section 1083(c)(4) as to Iraq pursuant to authority Congress granted him, that provision can have no legal effect on this case. In any event, an attempt by later legislators to ascribe intent to a previous, differently-constituted Congress, even if codified, cannot override the plain language of the statute as an expression of the intent of the Congress that passed it. *See Rainwater* v. *United States*, 356 U.S. 590, 593 (1958); *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839-40 (1988).

As Judge Roberts concluded in *Acree*, the D.C. Circuit's EWSAA holding contravenes this Court's precedents. Where, as in Section 1503, a statute uses the expansive term "any," the Court has consistently given that word the broadest possible sweep. *See, e.g., United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"); *United States* v. *Monsanto*, 491 U.S. 600, 609 (1989) ("The statutory provision at issue here is broad and unambiguous, and Congress' failure to supplement [the statute's] comprehensive phrase—'any property'—with an exclamatory 'and we even mean assets to be used to pay an attorney' does not lessen the force of the statute's plain language."); *see also United States* v. *Ballistrea*, 101 F.3d 827, 836 (2d Cir. 1996) ("'[I]t is unnecessary to go beyond the plain language of the statute. 'Any means any.'") (citations omitted).

This Court construed a similar provision in *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 835 (2008), which involved a statute conferring sovereign immunity of the United States for claims arising from the detention of property by "any officer of customs or excise or *any other law enforcement officer*." *Id.* (*citing* 28 U.S.C. 2680(c)) (emphasis added). The Court held that the provision included Bureau of Prisons officers because "[t]he phrase '*any* other law enforcement officer' suggests a broad meaning." *Id.* (emphasis in original). "Congress' use of 'any' to modify 'other law enforcement officer' is most naturally read to mean law enforcement officers of whatever kind." *Id.* at 836. Likewise, Congress' use

of the term "any" to modify "other provision of law" must mean all kinds of provisions of law.

As Judge Roberts noted, 370 F.3d at 62, the D.C. Circuit's decision in *Acree* also runs counter to this Court's decision in *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 587 (1980), which refused to construe the statutory term "any other final action" to encompass only actions that were "similar to the actions under the specifically enumerated provisions that precede that catchall phrase in the statute." The Court "discern[ed] no uncertainty in the meaning of the phrase, 'any other final action.'" *Id.* at 588. Accordingly, it held that, in the absence of contrary legislative history, that phrase "must be construed to mean exactly what it says, namely, *any other* final action." *Id.* at 589 (emphasis in original). Moreover, the Court also rejected the argument, based on "scant" legislative history, that Congress could not have intended to affect the jurisdiction of the courts without discussion of the matter, holding that "[i]n ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Id.* at 592. *See Acree*, 370 F.3d at 63 (Roberts, J.).

The D.C. Circuit in *Acree* did what *Harrison* and *Ali* say it should not. It held that the broad statutory phrase "any other provision of law" is to be read narrowly to encompass only "legal restrictions on assistance and funding for the new Iraqi Government," 370 F.3d at 57, based on the nature of the one law specifically listed in Section 1503 and the fact that the "sparse" and "inconclusive" legislative history did not specifically refer to federal court jurisdiction or the FSIA. The court should

have given effect to the words of the statute rather than rewriting it. *See PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 689 (2001) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.") (citation omitted).

Moreover, the D.C. Circuit's decision cannot be squared with this Court's holdings that the President has inherent authority—even *without* express statutory authorization—to compromise the claims of U.S. nationals to further foreign policy interests. *See Amer. Ins. Ass'n.* v. *Garamendi*, 539 U.S. 396, 414 (2003); *Dames & Moore* v. *Regan*, 453 U.S. 654, 679-80 (1981). This case squarely implicates a critically important foreign policy interest of the United States: this country's support for and relations with the new democratic government of Iraq. Under the cited cases, the President possesses the inherent authority to nullify the claims at issue in order to further that foreign policy. The President must necessarily have possessed the lesser ability to withdraw a judicial forum while still preserving the claims for diplomatic negotiation, given that Congress expressly authorized him to make inapplicable any law that was based on Iraq's former status as a state sponsor of terrorism.

Even the *Acree* majority found the issue an "exceedingly close question," 370 F.3d at 51, and its analysis has been rejected by two judges (then-Judge Roberts in *Acree* and Judge Bates in *Beaty*) and apparently questioned by two others (Judges Kavanaugh and Brown, who dissented from the denial of *en banc* reconsideration). A decision of

such debatable merits and unquestionable importance warrants this Court's review.

CONCLUSION

For the reasons set forth above, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 12, 2007 Decided June 24, 2008

No. 06-7175

ROBERT SIMON, ET AL.,
APPELLANTS
v.
REPUBLIC OF IRAQ, ET AL.,
APPELLEES

Consolidated with
06-7178

Appeals from the United States District Court
for the District of Columbia
(No. 03cv00691)
(No. 03cv00888)

Michael Rips argued the cause for appellants. With him on the briefs were *Stephen A. Fennell*, *Anthony F. Cavanaugh*, *Anthony A. Onorato*, *Justin B. Perri*, and *Alice Loughran*.

Eric J. Hecker, *Richard D. Emery*, and *Sarah Netburn* were on the brief for amici curiae Ethel Hurst, et al. in support of appellants.

Lawrence H. Martin argued the cause for appellees. With him on the briefs were *Gare A. Smith*, *Sarah A.*

Altschuller, *Timothy B. Mills*, and *Jonathan S. Franklin*.

Before: SENTELLE, *Chief Judge*, and GINSBURG and BROWN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge*: The plaintiffs in these two consolidated actions sued Iraq, the Iraqi Intelligence Service, and Saddam Hussein (together, Iraq) alleging they had tortured and taken certain of them hostage during the 1990-91 Gulf War. The plaintiffs relied upon 28 U.S.C. § 1605(a)(7), the exception in the Foreign Sovereign Immunities Act (FSIA), § 1602 *et seq.*, that allowed for lawsuits against state sponsors of terrorism. The district court dismissed the actions as untimely and the plaintiffs appealed. Iraq defends the district court's interpretation of the time limitation in the FSIA and alternatively invokes the political question doctrine.

After this appeal was briefed and argued, the Congress passed the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, 122 Stat. 3, § 1083 of which revised the terrorism exception to sovereign immunity by repealing § 1605(a)(7) of Title 28 and adding a new exception to be codified at § 1605A of Title 28. Section 1083(d) of the NDAA granted the President the authority to waive § 1083 with respect to Iraq, which he promptly did.

For the reasons that follow, we conclude the plaintiffs may maintain these suits pursuant to §

1605(a)(7), and their cases are timely and justiciable. Accordingly, we remand these matters to the district court for further proceedings.

I. Background

In 1996 the Congress amended the FSIA to abrogate in certain respects the sovereign immunity of any foreign state the Secretary of State designates a sponsor of terrorism. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241-43 (codified at 28 U.S.C. § 1605(a)(7)); *see also* 28 U.S.C. § 1604 (granting immunity to foreign states, their agencies, and their instrumentalities). As amended, § 1605(a)(7) provided in part that a foreign state was not immune from an action for damages "for personal injury ... caused by an act of torture ... [or] hostage taking" to a U.S. national if the foreign state had been "designated as a state sponsor of terrorism ... at the time the act occurred" and the plaintiff had given the foreign state "a reasonable opportunity to arbitrate the claim." The statute defined torture and hostage taking, *see* §§ 1605(e), 1350 note, by reference to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, 1465 U.N.T.S. 85, and the International Convention Against the Taking of Hostages art. 1, Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 205.

The plaintiffs filed their actions in 2003 and duly invoked § 1605(a)(7). Their amended complaints alleged that in 1990 and 1991 the defendants had tortured certain of the plaintiffs and held them hostage, in violation of local, federal, and international law; the other plaintiffs, members of

the alleged victims' families, sued for intentional infliction of emotional distress. Iraq was at all relevant times a designated state sponsor of terrori[illegible], 55 Fed. Reg. 37,793 (Sept. 13, 1990), and the complaints alleged the plaintiffs had offered Iraq the opportunity to arbitrate the disputes.

Iraq and the Iraqi Intelligence Service filed motions to dismiss both cases on the grounds that the actions were untimely under § 1605(f), which provides a limitation period of ten years for any action under § 1605(a)(7); the plaintiffs had failed to state a claim upon which relief could be granted; and the political question doctrine barred the court from proceeding. The district court held the two actions did not raise political questions but dismissed them as untimely. *Vine v. Republic of Iraq*, 459 F. Supp. 2d 10 (2006).

II. Analysis

On appeal, Iraq newly contends the recent enactment of the NDAA and the President's waiver of § 1083 thereof require the dismissal of these cases. Alternatively, Iraq argues the cases were untimely filed and are barred by the political question doctrine. Addressing the issues of law *de novo*, we reject each of Iraq's contentions.

A. NDAA 2008

On December 14, 2007 the Congress passed the first version of the NDAA, § 1083 of which would have amended the terrorism exception to foreign sovereign immunity by striking 28 U.S.C. § 1605(a)(7), the exception upon which the plaintiffs relied, and enacting a new exception, to be codified at 28 U.S.C. § 1605A. President Bush sought to

"pocket veto" the bill because he believed § 1083 would threaten the reconstruction of Iraq:

> [S]ection 1083 would risk the freezing of substantial Iraqi assets in the United States .... Section 1083 also would expose Iraq to new liability of at least several billion dollars by undoing judgments favorable to Iraq, by foreclosing available defenses on which Iraq is relying in pending litigation, and by creating a new Federal cause of action backed by the prospect of punitive damages to support claims that may previously have been foreclosed.

Memorandum of Disapproval, 43 WEEKLY COMP. PRES. DOC. 1641, 1641 (Dec. 28, 2007).

The Congress subsequently passed a revised version of the NDAA, which included a new provision (§ 1083(d)) that authorized the President, upon making certain findings, to "waive any provision of [§ 1083 of the NDAA] with respect to Iraq." The President signed that bill into law and promptly exercised his authority under § 1083(d)(1) to waive "all provisions of section 1083 with respect to Iraq, and all agencies and instrumentalities thereof." Presidential Determination No. 2008-9, 73 Fed. Reg. 6571 (Jan. 28, 2008).[1] Iraq contends the

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[1] The President had to and did find that "waiver is in the national security interest of the United States" and "will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq," and that "Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism." NDAA § 1083(d)(1); *see* 73 Fed. Reg. at 6571 (so finding).

enactment of the NDAA and the President's waiver of § 1083 with respect to Iraq stripped the federal courts of jurisdiction over these cases; the plaintiffs disagree, of course.

Section 1083(a) of the NDAA, which amended the FSIA by creating new § 1605A of Title 28, contains an exception to the grant of sovereign immunity similar to that in former § 1605(a)(7) but more advantageous to plaintiffs in several respects. For instance, it precludes a foreign state from filing an interlocutory appeal under the "collateral order" doctrine, 6 § 1605A(f), and permits a plaintiff to attach property in advance of judgment, § 1605A(g). In addition, § 1605A(c) abrogates *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004), by creating a federal right of action against foreign states, for which punitive damages may be awarded.

Iraq argues that because § 1083(b)(1) of the NDAA repeals § 1605(a)(7) of the FSIA, upon which the present cases were founded, we must dismiss these cases for want of jurisdiction. *See* 28 U.S.C. §§ 1330(a), 1604 (jurisdiction over case against foreign sovereign depends upon exception to immunity). Further, according to Iraq, the President's waiver of § 1083 of the NDAA prevents the plaintiffs from refiling their cases under the jurisdiction conferred by new § 1605A.

A statute removing federal jurisdiction presumptively applies to pending cases because such a statute "usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2765 (2006) (quoting *Hallowell v. Commons*, 239 U.S. 506,

508 (1916)); *see also Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997). In contrast, a statute that retroactively alters the consequences of primary conduct—as by "impair[ing] rights a party possessed when he acted, increas[ing] a party's liability for past conduct, or impos[ing] new duties with respect to transactions already completed," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)—is presumptively nonretroactive; such a statute applies to a pending case only if the Congress clearly so provides.

The FSIA speaks to the jurisdiction of the federal courts, but it also governs the immunity of foreign states in any U.S. forum. *See* 28 U.S.C. § 1604 ("a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this 7 chapter"); *cf. Hughes Aircraft Co.*, 520 U.S. at 951 ("statutes affect[ing] ... *whether* [a suit] may be brought at all ... speak[] not just to the power of a particular court but to the substantive rights of the parties as well" and are therefore "subject to [the] presumption against retroactivity"). Accordingly, it is not clear which presumption might apply, if any is needed. In this case, however, it is unnecessary to invoke either presumption because § 1083 makes several references to pending cases and we need not look beyond the text and structure of the NDAA to ascertain its effect upon cases brought under § 1605(a)(7). *Accord Hamdan*, 126 S. Ct. at 2762-69 (holding, based upon "[o]rdinary principles of statutory construction," the provision of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Title X, 119 Stat. 2680, 2739-44, that deprived the courts of

jurisdiction over habeas petitions filed by persons detained at Guantánamo Bay did not apply to habeas cases pending when it was enacted). For the reasons that follow, we conclude that the courts retained jurisdiction over cases pending pursuant to former § 1605(a)(7) when the Congress enacted the NDAA. *Cf. Republic of Austria v. Altmann*, 541 U.S. 677, 697-700 (2004) (applying ordinary principles of construction to decide whether FSIA, which codified immunity of foreign sovereigns, applies to conduct predating statute).

We note first that the new terrorism exception in § 1605A by its terms does not provide a substitute basis for jurisdiction over all cases pending under § 1605(a)(7) when § 1605A replaced it. The new provision deprives a foreign sovereign of immunity to suit only if

> (I) the foreign state was designated as a state sponsor of terrorism at the time the act [giving rise to the suit] occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated 8 within the 6-month period before the claim is filed under this section; or
>
> (II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the [NDAA for] 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) ... was filed.

28 U.S.C. § 1605A(a)(2)(A)(i). Inasmuch as this provision expressly distinguishes between cases "[filed] under this section"—*i.e.*, § 1605A—and cases "filed under section 1605(a)(7)" of the pre-amendment Act, a pending case obviously cannot be said to have been "filed under" the new provision. Therefore, the plaintiff in a case pending under § 1605(a)(7) may not maintain that action based upon the jurisdiction conferred by § 1605A; in order to claim the benefits of § 1605A, the plaintiff must file a new action under that new provision.

Because the courts have no jurisdiction of a case against a foreign sovereign absent an exception to the grant of immunity in the FSIA, and because § 1605A does not provide that exception for pending cases, Iraq contends the NDAA requires the dismissal of these cases. The plaintiffs, on the other hand, argue that § 1605(a)(7) remains a viable exception to immunity for cases, such as these, filed when it was the source of our jurisdiction. Based upon the following analysis of NDAA §§ 1083(c) ("Application to Pending Cases") and 1083(d) ("Applicability to Iraq"), we hold the courts retain jurisdiction pursuant to § 1605(a)(7) over cases that were pending under that section when the Congress enacted the NDAA.

Section 1083(c)(1). The first subsection of § 1083(c) provides: "The amendments made by this section [1083] shall apply to any claim arising under section 1605A." Because, as we have said, a claim pending under former § 1605(a)(7) when the NDAA became law did not "aris[e] under section 1605A," *cf. Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) ("A suit arises under the law that creates

the cause of action"), it is apparent that the 2008 amendments, including the "conforming amendments" that strike former § 1605(a)(7), *see* NDAA § 1083(b), do not apply to any claim then "pending" under that provision. Moreover, reading the Act to extinguish jurisdiction over cases pending under § 1605(a)(7) when the NDAA became law would render § 1083(c)(1) nugatory: There would be no need to specify "the amendments ... apply to any claim arising under section 1605A" for the amendments obviously would apply to any such claim and could apply to no other claim; as we interpret it, however, § 1083(c)(1) makes clear the "amendments" apply to any claim under § 1605A, but to no "pending" claims.[2]

Sections 1083(c)(2) and (c)(3). Plaintiffs with "pending cases" may invoke new § 1605A in certain circumstances. Pursuant to § 1083(c)(2) ("Prior Actions"), a plaintiff who detrimentally "relied upon" former § 1605(a)(7) of the FSIA "as creating a cause of action" and whose action was "pending before the courts in any form" when the NDAA became law was given 60 days within which to "refile" his suit based upon the new cause of action created by § 1605A(c). *See also* 28 U.S.C. § 1605A(a)(2)(A)(i)(II) (providing exception to immunity for 10 "original action" that is "refiled ... by reason of section 1083(c)(2)(A)"). Section 1083(c)(3) of the NDAA ("Related Actions") authorizes a plaintiff who had "timely commenced" a "related action" under § 1605(a)(7) to bring "any

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[2] In consequence, only a plaintiff prosecuting an action under new § 1605A of the FSIA can claim the benefits of that section, such as prejudgment attachment of the defendant's property.

other action arising out of the same act or incident," provided "the [new] action is commenced" within 60 days from the later of "(A) the date of the entry of judgment in the original action or (B) the date of the enactment of [the NDAA]."

These "transition rules," as Iraq calls them, cannot be squared with Iraq's position that the NDAA requires the dismissal of pending cases. The 60-day limit in § 1083(c)(3) implies a court could, after enactment of the NDAA, still enter judgment in an action filed under § 1605(a)(7). Iraq argues that in this context "entry of judgment" means only dismissal for want of jurisdiction rather than the entry of a judgment on the merits, but nothing in the text of § 1083 suggests the phrase has such a narrow meaning, *cf.* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "judgment" to mean judgment on the merits), and the structure of the NDAA indicates precisely the opposite. New § 1605A(a)(2)(A)(i)(II) of the FSIA refers to a pending "original action" being "refiled ... by reason of section 1083(c)(2)(A)" of the NDAA while referring to a new action being "filed ... by reason of section 1083(c)(3)" if a pending "related action" had been timely commenced, *see* 28 U.S.C. § 1605A(b), which implies the Congress understood that the courts would retain jurisdiction over the original "related action" described in § 1083(c)(3). That explains why the 60-day period for invoking § 1083(c)(2) began with the enactment of the NDAA, *see* § 1083(c)(2)(C)(ii), whereas the 60-day period in § 1083(c)(3) may run from "the date of the entry of judgment" in the "related action," which could be well after the enactment of the NDAA.

There would be no reason for the Congress to have tied the 60-day period in § 1083(c)(3) to the date of "entry of judgment" in a case pending under § 1605(a)(7) when the NDAA became law if, as Iraq argues, the quoted words mean only a dismissal for want of jurisdiction and the Act requires the dismissal of all pending cases. The text and structure of the NDAA thus compel the conclusion that, notwithstanding the enactment of the NDAA, a court still may enter a judgment on the merits in such a case, which it could not do if it did not have jurisdiction over the case. *See, e.g.*, *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause"). Because new § 1605A is inapplicable, that jurisdiction over pending cases can be founded only upon former § 1605(a)(7).[3]

Section 1083(c)(4). The final provision of § 1083(c) also is instructive. In 2003 the President acted under the Emergency Wartime Supplemental Appropriations Act of 2003 (EWSAA), Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579, to "make inapplicable with respect to Iraq ... any ... provision of law that applies

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[3] Iraq argues also that the 60-day rule authorizes the refiling of claims under § 1605A within 60 days following the date of entry of "judgment on claims involving non-sovereign parties or a different exception to sovereign immunity unaffected by Section 1083." That is clearly wrong. The 60-day period is tied to "the date of the entry of judgment in [an] original action" that was "timely commenced under section 1605(a)(7)," NDAA § 1083(c)(3); § 1605(a)(7) permits suits only against sovereign states, leaving no room for a case brought under "a different exception to sovereign immunity."

to countries that have supported terrorism." Presidential Determination No. 2003-23, 68 Fed. Reg. 26,459 (May 7, 2003). 12 In *Acree v. Republic of Iraq*, 370 F.3d 41 (2004), however, we held that the EWSAA did not authorize the President to suspend former § 1605(a)(7) with respect to Iraq. Paragraph (4) ("Preserving the Jurisdiction of the Courts") of subsection 1083(c) ("Application to Pending Cases") ratifies that holding: "Nothing in section 1503 of the [EWSAA] ... has ever authorized" the President to "mak[e] inapplicable ... any provision of [the FSIA or to] remov[e] ... the jurisdiction" of the federal courts. Thus both the text and the context of this provision make clear the Congress was intent upon "preserving" the courts' jurisdiction over "pending cases," which could only mean cases filed under former § 1605(a)(7).

Section 1083(d)(1). This section authorizes the President to "waive any provision of ... section [1083 of the NDAA] with respect to Iraq." If a suit against Iraq for terrorist acts could proceed only under § 1605A, as Iraq maintains, then the President could use § 1083(d)(1) to deprive the courts of jurisdiction and would have no reason ever to invoke the EWSAA; § 1083(c)(4) would be surplusage. *Cf. Duncan v. Walker*, 533 U.S. 167, 174 (2001) (we must "give effect ... to every clause and word of [the] statute").[4] Moreover, § 1083(d)(2)(C), which provides that the President's waiver authority applies

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[4] Iraq has not been designated a state sponsor of terrorism since 2004. 69 Fed. Reg. 61,702 (Oct. 20, 2004). Accordingly, even absent the President's waiver, no new action could have been filed against Iraq unless a prior or a related action was pending. *See* 28 U.S.C. § 1605A(a)(2)(A)(i).

"regardless of whether ... that authority affects any action filed before ... enactment of the [NDAA]," would be unnecessary if the Act deprived the courts of jurisdiction over pending cases.

Reading the NDAA, as we do, to leave intact jurisdiction over cases pending under former § 1605(a)(7) gives meaning both to § 1083(c)(4) and to § 1083(d) and makes sense of the relation between them. Section 1083(c)(4) clarifies that the President has no authority under the EWSAA to limit the jurisdiction of the courts over cases against Iraq. Section 1083(d)(1) then grants the President the authority to render inapplicable those provisions of the NDAA to which President Bush had objected when he vetoed the first version of the NDAA.[5]

* * *

Cognizant of the President's concerns and of the potential implications of our holding upon the foreign affairs of the United States, we do not lightly conclude the NDAA leaves intact our jurisdiction over cases, such as these, that were pending against Iraq when the Congress enacted the NDAA. Nonetheless, the NDAA fairly compels the conclusion that the plaintiffs may proceed on the basis of former § 1605(a)(7). It follows that the President's waiver of § 1083 of the NDAA with respect to Iraq affects neither the jurisdiction of the

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[5] The President raised the same concerns when he exercised his waiver authority. 73 Fed. Reg. 6571 (discussing same non-jurisdictional implications).

district court over cases pending under § 1605(a)(7) nor the issues presented on this appeal.[6]

B. Timeliness

The jurisdictional provision upon which the plaintiffs rely contains a limitation period:

> No action shall be maintained under [§ 1605(a)(7)] unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

28 U.S.C. § 1605(f) (2007). The plaintiffs contend their actions, which they filed in 2003, are timely even though the alleged torts occurred more than ten years earlier, in 1990 and 1991. They argue first that their causes of action did not arise, and the ten-year limitation therefore did not begin to run, until 1996, because they could not have sued Iraq before then. They contend alternatively that the ten-year limitation period was equitably tolled until 1996; more precisely, they argue § 1605(f) requires that we extend the period of limitation by "the period during which [Iraq] was immune from suit." We agree with their alternative argument and, accordingly, need not reach the (rather strained) argument that their claims did not arise until 1996.

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[6] We have no occasion, therefore, to address the plaintiffs' alternative argument that the President left § 1605(a)(7) intact by waiving "all" provisions of § 1083 including subsection (b)(1)(A)(iii), which repeals former § 1605(a)(7).

Section 1605(f) expressly incorporates "principles of equitable tolling." Iraq argues—and we do not disagree—the statute thereby incorporates the relevant common law. According to Iraq that means the plaintiffs are entitled only to a "reasonable" extension of the statute of limitations, *Phillips v. Heine*, 984 F.2d 489 (D.C. Cir. 1993); the suits would then be untimely—assuming, as we do for the sake of the argument, the plaintiffs' causes of action arose in 1990 and 1991—because the plaintiffs have not demonstrated they reasonably required an extension to 2003, two or three years beyond the expiration of the statute of limitations, in order to bring their cases.

It seems, however, we have not applied the doctrine of equitable tolling consistently in the manner Iraq suggests. In *Phillips*, upon which Iraq relies, we held that "tolling does not bring about an automatic extension of the statute of limitations by the length of the tolling period. ... It gives the plaintiff extra time *only* if he needs it," 984 F.2d at 492; that is, the plaintiff obtains a "reasonable" extension. In *United States v. Saro*, 252 F.3d 449 (2001), in contrast, we held that equitable tolling stops the clock for the duration of a tolling event. *Id.* at 454 (citing *United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991) (dictum)); *see* Calvin W. Corman, Limitation of Actions § 8.2 (1991) ("When the commencement of an action is stayed due to statutory prohibition, the period of the stay is not included in the calculation of the limitation period"); *cf. Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 434-35 (1965) (equitable tolling, rather than giving plaintiff a "reasonable" extension of statute of

limitations in FELA, stops clock for duration of tolling event).

Saro and *Phillips* undoubtedly conflict, and our subsequent cases do not resolve the conflict. In *Chung v. DOJ*, upon holding the distinct doctrine of equitable estoppel (which is based upon the conduct of the defendant) did not extend the statute of limitations on the facts of that case, we left it to the district court on remand to decide, à la *Phillips*, whether the plaintiff was entitled to a "reasonable" extension of the statute of limitations under the doctrine of equitable tolling. 333 F.3d 273, 278-80 (2003). We did not notice the conflict between *Saro* and *Phillips*. We now see not only the intra-circuit but also an inter-circuit inconsistency. *Compare Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir. 1991) (tolling provides a reasonable extension), *with Socop-Gonzalez v. INS*, 272 F.3d 1176, 1193-96 (9th Cir. 2001) (en banc) (tolling stops the clock).

We need not resolve our home-grown conflict in this case because the statute is clear: We "include," *i.e.*, add, "the period during which [Iraq] was immune from suit"; hence cases filed in 2003 are timely.[7] Iraq asserts that, because we narrowly interpret the waiver of immunity by a sovereign state, *see, e.g.*, *Irwin v. Dep't of Veterans Affairs*,

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[7] Nor need we decide whether the statute would call for the application of state rather than federal common law, whatever the latter may be, with regard to equitable tolling. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); 28 U.S.C. § 1652; *see also United States v. Yazell*, 382 U.S. 341 (1966) (applying state law in interstices of federal statute). 272 F.3d 1176, 1193-96 (9th Cir. 2001) (en banc) (tolling stops the clock).

498 U.S. 89, 94 (1990) (waiver by the United States); *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1162 (D.C. Cir. 2002) (waiver by foreign state), we ought strictly to interpret § 1605(f) and limit Iraq's exposure by following *Phillips*. Cases on the scope of a waiver with its consequences for the fisc are inapposite, however, for the Congress did not waive Iraq's sovereign immunity in enacting § 1605(a)(7); only the sovereign can forswear the sovereign's legal rights. In the terrorism exception the Congress qualified the statutory grant of immunity to Iraq, itself a matter of "grace and comity." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). Iraq has pointed to no authority suggesting the Congress intended courts to read § 1605(f) any more narrowly than its terms suggest; nor are we aware of any case in which a court presumed or suggested exceptions to foreign sovereign immunity should be construed narrowly. *Cf. Saudi Arabia v. Nelson*, 507 U.S. 349, 356-58 (1993) (using ordinary methods of construction to interpret exception in § 1605(a)(2)).

We are therefore left to interpret the plain text of § 1605(f) unencumbered by any special canons of construction, and the text makes clear Iraq's interpretation must fail. Section 1605(f) invokes the "principles of equitable tolling" and expressly requires that in "calculating [the ten-year] limitation period" we "includ[e] the period during which [Iraq] was immune from suit." To say the plaintiffs were entitled only to a reasonable term after the ten-year period ran out in 2000 or 2001 would not fulfill the mandate that we "includ[e]" the five or six years of Iraq's immunity in the calculation of the limitations period. Thus, to

read the statute as Iraq insists would deprive the quoted phrases of their plain meaning.

The Congress first amended the FSIA to add a terrorism exception in 1996, before which Iraq was "immune from suit"; hence the limitation period in § 1605(f) began to run in 1996 and expired in 2006. Accordingly, the plaintiffs timely filed their actions in 2003.

C. Political Question Doctrine

Iraq asserts that the present cases are barred by the political question doctrine, for which proposition it points to several of the President's statements suggesting this action is contrary to the foreign policy of the United States. We have already noted and quoted Presidential Determination 2003-23 under the EWSAA. 68 Fed. Reg. 26,459. The President also issued Executive Order 13,303 declaring that "the threat of attachment or other judicial process" against Iraqi oil interests "obstructs the orderly reconstruction of Iraq," 68 Fed. Reg. 31,931 (May 22, 2003), and sent a message to the Congress stating that he had used his authority under the EWSAA to make § 1605(a)(7) inapplicable to Iraq because the "threat of attachment or other judicial process" against Iraqi oil assets "constituted an unusual and extraordinary threat to the national security and foreign policy of the United States." 39 WEEKLY COMP. PRES. DOC. 647, 647-48 (May 22, 2003).

In addition, Iraq points to an unenacted version of the Foreign Relations Authorization Act of 2004, *see* S. 925, 108th Cong. § 811 (2003), asserting that the Congress "voiced its support for the President's determination" that suits such as these are contrary to the foreign policy of the United States. The Senate

Foreign Relations Committee approved that bill, but the Committee does not speak for the Congress, which last spoke to this subject when it enacted the NDAA. Therefore, we confine our analysis to the President's position that the threat of a monetary judgment against Iraq contravenes the foreign policy of the United States.

The federal courts may not pass upon a question the Constitution commits to the political branches. *See Baker v. Carr*, 369 U.S. 186, 217 (1962); *see also id.* at 211-13. In *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005), for instance, foreign plaintiffs alleged that Japanese soldiers had subjected them to torture and sexual slavery in violation of 19 international law. Japan and the plaintiffs debated whether the treaties between Japan and the countries from which the plaintiffs came extinguished their claims. We held the political branches alone could resolve that dispute because it "concerns the United States only with respect to her foreign relations." *Id.* at 51-52.

To be sure, the foreign policy considerations Iraq raises are important, as the President's actions and statements make clear. But Iraq has not explained how adjudicating the question whether Iraq committed acts of torture and hostage taking in 1990-91 requires the court to address any question the Constitution commits to the political branches. Indeed, Iraq does nothing more than assert that this action may affect the foreign relations of the United States, but that is surely not enough. *Baker*, 369 U.S. at 211 ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance"). The political question

doctrine does not call upon us to decide whether a lawsuit that raises only justiciable questions contravenes the foreign policy of the United States; if the political branches decide tort suits against a foreign sovereign are contrary to the foreign policy of the Nation, then they may by law remove them from our jurisdiction.

Nor has Iraq explained how the President, by making general statements or taking actions not specific to these cases, can set to naught a duly enacted jurisdictional statute. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634, 637-38 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by 20 disabling the Congress from acting upon the subject."); *see also Altmann*, 541 U.S. at 702 (noting the FSIA "might well" require a court to defer to a statement of interest filed by the Department of State in a particular case). The Congress has given the courts of the United States the jurisdiction to decide the legal issues and factual questions raised by the plaintiffs' allegations, which sound in tort; accordingly the courts have the duty to proceed to the extent the actions are justiciable. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should"). The present actions undoubtedly present questions fit for

judicial determination under Article III—to wit, whether in 1990-91 Iraq committed the torts alleged—regardless whether their resolution might affect the foreign relations of the Nation.

III. Conclusion

In sum, we hold that neither § 1083 of the NDAA nor the President's waiver under § 1083(d) thereof deprives the courts of jurisdiction over these cases, which were pending under § 1605(a)(7) when the NDAA went into effect. Because the instant actions were timely filed and justiciable, we reverse the judgment of the district court and remand these cases to the district court for further proceedings consistent herewith.

So ordered.

APPENDIX B

United States District Court
FOR THE DISTRICT OF COLUMBIA

Decided September 7, 2006

No. 2001-2764

James S. Vine, ET AL.,
Plaintiffs
v.
REPUBLIC OF IRAQ,
Defendant
Civil Action 01-02674 (HHK)

Robert Simon, ET AL.,
Plaintiffs
v.
REPUBLIC OF IRAQ, ET AL.,
Defendants
Civil Action 03-00691 (HHK)

Nabil Seyam, ET AL.,
Plaintiffs
v.
REPUBLIC OF IRAQ, ET AL.,
Defendants
Civil Action 03-00888 (HHK)

MEMORANDUM OPINION AND ORDER

These three consolidated actions all challenge the conduct of the Republic of Iraq ("Iraq") during the period prior to the first Gulf War in 1990. Plaintiffs in all three cases allege that, during the course of its invasion of the State of Kuwait, Iraq unlawfully took plaintiffs hostage and, in some cases, tortured them. Before the court are defendants'[1] motions to dismiss, filed in these cases prior to consolidation. Upon consideration of defendants' motions, the oppositions thereto, and the record of the case, the court concludes that defendants' motions should be granted in Civil Actions 03-000691 and 03-00888 and granted in part and denied in part in Civil Action 01-02674.

I. BACKGROUND

The facts underlying this consolidated action as alleged by plaintiffs are as follows. On August 2, 1990, Iraqi armed forces invaded Kuwait, seizing control of the country. Immediately thereafter, Saddam Hussein, then-President of Iraq, issued a directive prohibiting all foreign nationals, including more than 2,000 American citizens, from leaving Iraq and Kuwait. In both countries, American citizens were denied access to their passports, refused exit visas, and physically prevented from leaving the cities of Baghdad and Kuwait City by the use of roadblocks. Approximately two weeks later, Hussein ordered all American citizens to report to

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[1] In addition to Iraq, Saddam Hussein, then-President of Iraq, and the Iraqi Intelligence Service are named as defendants in Civil Actions 03-000691 and 03-00888. Collectively, the defendants will be referred to as "Iraq."

hotels in those two cities. Those who obeyed his order, as well as others captured by Iraqi authorities, were forcibly relocated to strategic sites in Iraq where they served as "human shields" to prevent an attack by the allied forces. Additionally, a large number of Americans sought safe haven from Iraqi military forces by seeking refuge in either diplomatic properties or in private residences and "safehouses" throughout Kuwait and Iraq.

On August 19, 1990, President George H.W. Bush declared that all United States citizens in Kuwait and Iraq, regardless of whether they were in the physical custody of Iraqi forces, were "hostages" because they were being used by Hussein as leverage to prevent the United States and its allies from attacking Iraq and liberating Kuwait. President Bush demanded that Hussein release all American citizens and warned that the Iraqi government would be responsible for their safety and well-being.

By the end of August, Hussein authorized the release of all American women and children and several American male hostages with serious medical conditions. At the same time,Hussein promised to release the remaining hostages in exchange for a promise from the United States not to attack Iraq. The United States refused to accede to Hussein's demands and repeated its call for the release of all American citizens in Kuwait and Iraq.

On September 1, 1990, as a result of the illegal seizure and detention of American citizens in Kuwait and Iraq, the U.S. Department of State designated Iraq a "terrorist state" under 50 U.S.C. § 2405(j).

Between September 1, 1990, and December 1990, Hussein intermittently permitted the release of small groups of the remaining male hostages for medical and "humanitarian" purposes.

The hostage situation ultimately came to an end in the second week of December 1990 when Hussein ordered the release of the last group of approximately 250 American hostages.

During their captivity, the American hostages were subject to conditions of confinement that were "harsh, cruel, degrading, and often terrorizing." *Vine* Third Am. Compl. (Civ. No. 01-2674) ("*Vine* TAC"). These hostages "lived in constant fear for their lives and suffered from fatigue, depression, severe anxiety and stress, and the loss of the companionship of their loved ones." *Id.*

In 1999, a class action was filed on behalf of hundreds of the American citizens, and their spouses, who were held hostage by Iraq. *Hill v. Republic of Iraq*, Civ. No. 99-3346 (D.D.C.) (Jackson, J.). Iraq failed to appear in this action, and the case proceeded by default before Judge Jackson. On June 29, 2001, Judge Jackson denied the *Hill* plaintiffs' motion for class certification. Subsequently, on December 5, 2001, Judge Jackson imposed a moratorium on the addition of new plaintiffs and assertedly informed plaintiffs' counsel that any other former hostages who wished to bring claims against Iraq would have to file a separate suit.

Three weeks later, having been precluded from participating in the *Hill* litigation, plaintiffs in one of the consolidated cases in this matter, *Vine, et al. v. Republic of Iraq*, Civ. No. 01-2674 (D.D.C.), filed

their complaint.[2] The third amended complaint in *Vine*, which includes class action allegations, names 236 plaintiffs, all of whom were either taken hostage by Iraq in 1990 and/or were spouses of individuals who were taken hostage.[3]

In 2003, two more related cases were filed in this jurisdiction. The first, *Simon, et al. v. Republic of Iraq, et al.*, Civ. No. 03-691 (D.D.C.), involves allegations that two individuals—Robert Simon, a CBS News reporter, and Roberto Alvarez, a cameraman working for CBS News—were illegally seized and subsequently tortured by Iraqi officials in 1991. The second, *Seyam, et al. v. Republic of Iraq, et al.*, Civ. No. 03-888 (D.D.C.), involves similar allegations by plaintiff Nabil Seyam. The three suits were consolidated in May 2005.

II. ANALYSIS

A. Statutory Framework of the Foreign Sovereign Immunities Act

As a general rule, the Foreign Sovereign Immunities Act ("FSIA"), enacted in 1976, establishes that foreign states (including "a political subdivision of a foreign state or an agency or

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[2] Plaintiffs' original complaint was filed on December 27, 2001, by Vine and thirty-four others. Three times thereafter, plaintiffs amended their complaint adding a total of 201 more individuals as plaintiffs.

[3] Two hundred of these plaintiffs were physically present in Iraq or Kuwait on August 2, 1990. Seventy were married to an American hostage who was physically present in Iraq or Kuwait on August 2, 1990. Of these seventy spouses, thirty-four were themselves in Iraq during 1990 but were released prior to their spouses.

instrumentality of a foreign state," 28 U.S.C. § 1603(a)), are immune from suit in courts in the United States. 28 U.S.C. § 1604.[4] A limited number of exceptions to this general rule of immunity are enumerated. *Id.* § 1605. The most recent of the exceptions, and the one implicated in this case, provides that a foreign state "shall not be immune from the jurisdiction of courts of the United States or of the States in any case" where "money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act." *Id.* § 1605(a)(7).

In order for this so-called "state-sponsored terrorism exception" to apply, three criteria must be satisfied: (1) the foreign state must be designated as a state sponsor of terrorism at the time of the terrorist act or as a result of the terrorist act; (2) the foreign state must be afforded a reasonable opportunity to arbitrate the claim if the act occurred within the foreign state against which the claim has been brought; and (3) either the claimant or the victim must have been a national of the United States at the time of the terrorist act. *Id.* § 1605(a)(7)(A),(B); *see also Cicippio-Puleo v. Islamic*

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[4] Section 1604 of FSIA, 28 U.S.C. § 1604, states:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605–1607 of this chapter.

Republic of Iran, 353 F.3d 1024, 1028–29 (D.C. Cir. 2004).

Section 1605(a)(7) of FSIA is "merely a jurisdiction-conferring provision that does not otherwise provide a cause of action against either a foreign state or its agents." *Cicippio-Puleo*, 353 F.3d at 1032. To determine what causes of action, if any, may be pressed against a nonimmune foreign state, FSIA directs courts to pre-existing causes of action. Specifically, § 1606 of FSIA provides, in relevant part:

> *As to any claim for relief with respect to which a foreign state is not entitled to immunity . . . , the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.*

28 U.S.C. § 1606. Based on this language, "a plaintiff should be able to bring a cause of action under state or common law, federal statutes (where Congress has not indicated otherwise), and even possibly the law of a foreign country in a Section 1605(a)(7) case, as long as the plaintiff would be able to bring such a claim against an individual in similar circumstances." *Holland v. Islamic Republic of Iran*, 2005 U.S. Dist. LEXIS 40254, at *35–36 (D.D.C. Oct. 31, 2005).

B. Subject Matter Jurisdiction

Iraq argues that the court lacks subject matter jurisdiction over the claims of at least 170 of the plaintiffs in the *Vine* litigation, contending that the state-sponsored terrorism exception does not apply to the claims of those plaintiffs because they were not taken "hostage" as FSIA defines that term. Iraq

correctly states that the state-sponsored terrorism exception embodied in 28 U.S.C. § 1605(a)(7) "does not abrogate the sovereign immunity of nations the Department of State has designated state sponsors of terrorism for any and all purposes." Def.'s Mot. (Civ. No. 01-2674) at 4. Rather, § 1605(a)(7) only waives the immunity of such states with respect to claims "for personal injury or death that was caused by an act or torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act." 28 U.S.C. § 1605(a)(7).

The *Vine* plaintiffs do not allege that their claims arise from acts of "torture," "extrajudicial killing," or "aircraft sabotage." Rather, their claims all arise from the "hostage taking" that occurred when Saddam Hussein's regime assertedly detained them at the outbreak of hostilities between Kuwait and Iraq in 1990. Hostage taking is defined in § 1605(e) of FSIA to have "the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages." 28 U.S.C. § 1605(e)(2). Article 1 of the International Convention Against the Taking of Hostages, in turn, states:

> *Any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages.*

U.N. GAOR, Supp. No. 39, U.N. Doc. A/34/39 (1979). Iraq insists that at least 170 of the *Vine* plaintiffs—those who were not physically held by Iraqi forces but rather received sanctuary at various diplomatic premises or found haven in private safehouses after the invasion of Kuwait—were not "seized" or "detained" by Iraq and that, even assuming they were, the purpose of such "detention" was not to compel a third party to do or refrain from doing something.

Accordingly, Iraq insists that FSIA does not waive its immunity with respect to the claims of these plaintiffs and their claims must be dismissed. The court disagrees.

As the Fifth Circuit has held, "a hostage is 'seized' or 'detained' . . . when she is held or confined against her will for an appreciable period of time." *United States v. Carrion-Caliz*, 944 F.2d 220, 225 (5th Cir. 1991).[5] In an analogous criminal case, the Second

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[5] In *Carrion-Caliz*, the Fifth Circuit was interpreting the Hostage Taking Act, which provides that "whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or governmental organization to do or abstain from any act . . . shall be punished by imprisonment by any term of years or for life." 18 U.S.C. § 1203(a) In *Carrion-Caliz*, the Fifth Circuit was interpreting the Hostage Taking Act, which provides that "whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or governmental organization to do or abstain from any act . . . shall be punished by imprisonment by any term of years or for life." 18 U.S.C. § 1203(a) In *Carrion-Caliz*, the Fifth Circuit was interpreting the Hostage Taking Act, which provides that "whoever, whether inside or outside the United States, seizes or detains and

Circuit clarified that the government "need not show that the defendant actually used physical force or violence to restrain that person" in order to prove that a hostage was held against her will. *United States v. Si Lu Tian*, 339 F.3d 143, 153 (2d Cir. 2003). Rather, all that is necessary is evidence that "the defendant threatened, frightened, deceived or coerced his hostage so as to cause the hostage to remain under the defendant's control." *Id.*; *see also Carrion-Caliz*, 944 F.2d at 227 (holding that the victims were taken hostage when the defendant "frightened or deceived them sufficiently to cause them to remain in his house").

Moreover, as Judge Jackson wrote in the *Hill* litigation, the "essence of the tort of hostage taking is false imprisonment," 175 F. Supp. 2d at 46, which is defined in the District of Columbia as the unlawful "detention or restraint of one against his will, within boundaries fixed by the defendant." *Faniel v. Chesapeake & Potomac Tel. Co.*, 404 A.2d 147, 150 (D.C. 1979); *see also Abourezk v. New York Airlines,*

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threatens to kill, to injure, or to continue to detain another person in order to compel a third person or governmental organization to do or abstain from any act . . . shall be punished by imprisonment by any term of years or for life." 18 U.S.C. § 1203(a) In *Carrion-Caliz*, the Fifth Circuit was interpreting the Hostage Taking Act, which provides that "whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or governmental organization to do or abstain from any act . . . shall be punished by imprisonment by any term of years or for life." 18 U.S.C. § 1203(a)

Inc., 895 F.2d 1456, 1458 (D.C. Cir. 1990).[6] In this context, a plaintiff is detained whenever the defendant "deprive[s] the plaintiff of his freedom of locomotion for any length of time by force or threat of force." *Dist. of Columbia v. Gandy*, 450 A.2d 896, 899 (D.C. 1982). All the *Vine* plaintiffs, even those not in the physical control of Iraq, are alleged to have been deprived of their freedom of locomotion by being constructively confined, by force or threat of force, to safehouses and diplomatic properties.

Furthermore, those plaintiffs who were not in the physical custody of Iraq assertedly "spent most of their time in detention hiding in private residences and 'safehouses'" where they lived "under harsh conditions and in constant fear of being discovered

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[6] Iraq insists that analogizing "hostage taking" in FSIA to the tort of false imprisonment is inappropriate given the criminal nature of the International Convention Against the Taking of Hostages. Def.'s Reply (Civ. No. 01-2674) at 3. Because the Convention assertedly covers "penal matters," Iraq insists that the rule of lenity applies and that any ambiguity in the language of the statutory definition of "hostage taking" must therefore be resolved in its favor. In making this argument, Iraq fails to recognize that it is a defendant in a case brought under the statesponsored terrorism exception of FSIA, which waives immunity only for *civil* claims. 28 U.S.C. § 1605(a)(7) (waiving immunity of a foreign state sponsor of terrorism in cases "in which money damages are sought"). The fact that the state-sponsored terrorism exception incorporates a definition from a treaty that covers "penal matters" does not change the fact that Iraq here is susceptible to solely civil penalties. *See United States v. Crippen*, 371 F.3d 842, 844 (D.C. Cir. 2004) ("[T]he rule of lenity requires that we interpret an ambiguous *criminal statute* in the defendant's favor.") (emphasis added). Because FSIA is not a criminal statute, and Iraq is not a criminal defendant, the rule of lenity has no application.

by Iraqi security forces." *Vine* TAC ¶ 19. It is a reasonable inference from these allegations that such deprivation of freedom was "against their will." As such, all of the *Vine* plaintiffs—even those not under Iraq's direct control—were "seized" or "detained" within the meaning of the FSIA.

Iraq's second argument—that those plaintiffs who were not in the physical custody of Iraq were not hostages given that the purpose of their alleged detention was not to compel a third party to do or refrain from doing something—is likewise unconvincing. The *Vine* plaintiffs' Third Amended Complaint certainly includes allegations that all plaintiffs were used to extract concessions from the United States. Specifically, the *Vine* plaintiffs allege that all Americans, including those forced into hiding by Iraq's actions, were used by Saddam Hussein to "compel the United States and other foreign states to abstain from launching an armed attack upon Iraq as an explicit or implicit condition for the[ir] release." *Vine* TAC ¶ 27. These allegations are sufficient, at this point in the litigation, to establish that those in hiding were used "in order to compel" the United States "to do or abstain from doing an act."[7]

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[7] In its reply brief, Iraq argues for the first time that there is a factual dispute as to whether those plaintiffs who were forced into hiding in Iraq and Kuwait were hostages as that term is defined in the FSIA, and that limited discovery is necessary to resolve this issue. Def.'s Reply (Civ. No. 01-2674), at 4–5. The court disagrees that discovery is needed at this time, for in cases where a jurisdictional determination is "inextricably intertwined with the merits of the case," that determination should be postponed until "the merits are heard." *Herbert v.*

For these reasons, the court agrees with Judge Jackson's legal conclusion in the *Hill* litigation—litigation involving identical allegations as those found here—that "American citizens denied permission to leave Kuwait and Iraq from August through mid-December, 1990," including those who took refuge in safehouses and diplomatic properties, were "'hostages' within the meaning of the FSIA" because they were "kept against their will," were "unable to move about freely," and were used "as bargaining commodities—to extract concessions from the United States and its coalition allies in exchange for their release." *Hill*, 175 F. Supp. 2d at 39, 46–47.

In reaching this decision, the court finds comfort in the fact that the position of the executive branch of the United States government at the time of the Kuwait invasion was that the Americans detained in Kuwait and Iraq were, in fact, "hostages" because they were being used by Hussein as leverage to prevent the United States and its allies from attacking Iraq and liberating Kuwait. *See Vine* TAC ¶ 15; *see also* Andrew Rosenthal, *Bush Vows Not to be Cowed by the Taking of "Hostages"; Iraq Shifts them to Targets*, N.Y. TIMES, Aug. 21, 1990, at A1 (quoting

For example, the Supreme Court has held that the following foreign policy issues are nonjusticiable

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Nat'l Acad. of Sciences, 974 F.2d 192, 198 (D.C. Cir. 1992); *see also Lawrence v. Dunbar*, 919 F.2d 1525, 1530 (11th Cir. 1990). This is such a case, given that a showing that plaintiffs were held hostage would resolve the merits of this case. *See Green v. Hill*, 954 F.2d 694, 697 (11th Cir. 1992) ("Jurisdiction and the merits are intertwined if a decision on one would effectively decide the other.").

political questions: a determination of when war begins or when a war ends, *Commercial Trust Co. v. Miller*, 262 U.S. 51, 57 (1923); recognition of foreign governments, *United States v. Belmont*, 301 U.S. 324, 328 (1937); questions concerning the diplomatic status President George H.W. Bush as stating that, when referring to those American trapped in Kuwait and Iraq, because "Saddam Hussein specifically offers to trade the freedom of those citizens . . . he holds against their will in return for concessions, there can be little doubt that whatever these innocent people are called, they are in fact hostages"). Although not binding on this court, the executive branch's view is owed some deference. *Cf. Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 185–86 (1982) ("[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."). Moreover, in another context, Congress afforded "hostage status" to all U.S. citizens trapped inside Iraq or Kuwait who were "held in custody by governmental or military authorities" of Iraq or who took "refuge within [Iraq or Kuwait] in fear of being taken into such custody." Pub. L. No. 101-513, Tit. V, § 599C, 104 Stat. 1979, 2065 (Nov. 5, 1990).

Having concluded that this court may exercise subject matter jurisdiction over the claims of *all* plaintiffs against Iraq in this consolidated matter, the court will proceed to address Iraq's other arguments in favor of dismissal.

C. The Political Question Doctrine

Iraq argues that this case presents a non-justiciable political question. The political question

doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).[8] While the "propriety of what may be done in the exercise of [foreign relations] is not subject to judicial inquiry or decision," *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918), "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962). Iraq suggests that the question of its liability in these cases likewise presents a non-justiciable political question, primarily because any decision to award plaintiffs compensation would undermine the efforts of the President and Congress "to create a stable Iraq." Def.'s Mot. (Civ. No. 01-2674) at 31. The court disagrees.

This case does not require an evaluation of any executive or congressional policy decision or value judgment. Rather, it involves the liability of a foreign sovereign under a well-defined statutory scheme—a statutory scheme that was enacted by both houses of Congress and signed by the President. "[G]iven the fact that both the Executive and Legislative Branches have expressly endorsed the

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[8] For example, the Supreme Court has held that the following foreign policy issues are nonjusticiable political questions: a determination of when war begins or when a war ends, *Commercial Trust Co. v. Miller*, 262 U.S. 51, 57 (1923); recognition of foreign governments, *United States v. Belmont*, 301 U.S. 324, 328 (1937); questions concerning the diplomatic status of individuals claiming immunity, *In re Baiz*, 135 U.S. 403, 431–32 (1890); and the ratification and interpretation of treaties, *Terlinden v. Ames*, 184 U.S. 270, 286 (1902).

concept of suing terrorist [states] in federal court, . . . resolution of this matter will not exhibit 'a lack of respect due coordinate branches in government.'" *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 50 (2d Cir. 1991) (quoting *Baker*, 369 U.S. at 217) (holding that the political question doctrine does not apply to claims under the Anti-Terrorism Act for acts of terrorism perpetrated by the PLO).

Moreover, the efforts of the government to rebuild Iraq, simply put, are irrelevant to a determination of Iraq's liability under FSIA. Congress explicitly gave the courts jurisdiction over claims where the defendant, a foreign sovereign, was designated as a state sponsor of terrorism "at the time the act occurred." 28 U.S.C. § 1605(a)(7)(A). By focusing on the foreign sovereign's designation at the time the act occurred, as opposed to when the suit is pending, Congress chose to allow a plaintiff to pursue claims against even those foreign nations whose sponsorship of terrorism ceases. For these reasons, the court declines to "convert what is essentially an ordinary tort suit into a non-justiciable political question" merely because its claims "arise in a politically charged context." *Klinghoffer*, 937 F.2d at 49.

D. Statute of Limitations

Actions brought under § 1605(a)(7) are subject to a statutory ten-year limitations period. *See* 28 U.S.C. § 1605(f) ("No actions shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose."). Congress, however, explicitly mandated that "[a]ll principles of equitable tolling, including the period during which the foreign state

was immune from suit, shall apply in calculating the limitations period." *Id.* Iraq insists that all three complaints in this consolidated matter are timebarred because none of the plaintiffs filed their complaint within ten years of the date on which their causes of action arose—according to Iraq, by December 9, 1990, at the latest—and because equitable tolling, when properly applied, does not save the complaints. Although this issue is a close one, the court agrees with Iraq in part and concludes that the *Simon* and *Seyam* complaints were not timely filed.

Despite the fact that plaintiffs' injuries all occurred more than ten years before any of the complaints at issue were filed, plaintiffs nevertheless insist that their complaints are timely because the statute of limitations on their claims did not begin to run until April 1996, when Congress added the state-sponsored terrorism exception to FSIA. *See* Pls.' Opp'n (Civ. No. 01-2674) at 12 n.4; Pls.' Opp'n (Civ. No. 03-691) at 3–6; Pls.' Opp'n (Civ. No. 03-888) at 3–6. The *Vine* plaintiffs base this suggestion on the principle that "no cause of action generally accrues until the plaintiff has the right to enforce his cause." *See* Pls.' Opp'n (Civ. No. 01-2674) at 12 n.4 (quoting *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1458 (5th Cir. 1972)). This argument, however, confuses what it means for a cause of action to "arise" and what it means for a cause of action to "accrue," a distinction important to this case. A claim "arises" on the date that the action in question occurred, yet does not "accrue" until a prior disability to suit is removed. *See Heinrich v. Sweet*, 118 F. Supp. 2d 73, 79–80 (D. Mass. 2000)

(explaining the "subtle, yet important, difference between the two words"); *see also Kaplan v.Shure Bros.*, 153 F.3d 413, 422 (7th Cir. 1998) ("[A] cause of action can 'arise' before it 'accrues.'); *Van Den Hul v. Baltic Farmers Elevator Co.*, 716 F.2d 504, 510 n.4 (8th Cir. 1983) (noting that "in certain contexts, the words 'accrue' and 'arise' have significantly different meanings."); *Abramson v. P.J. Currier Lumber Co.*, 2001 U.S. Dist. LEXIS 1039, at *2–3 (D.N.H. Jan. 17, 2001) ("The point at which a cause of action 'arises' can be different from the point at which it 'accrues.'"). Given this distinction, plaintiffs' argument that the statute of limitations did not begin to run until 1996 must be rejected, for, according to FSIA, the statute of limitations began when their cause of action "arose," i.e., when the action in question occurred.[9] Plaintiffs' complaints

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[9] The *Simon* and *Seyam* plaintiffs cite a number of cases that assertedly stand for the proposition that Congress specifically allowed for the bringing of suits, absent tolling, up to ten years from the date of *enactment* of the state-sponsored terrorism exception, rather than ten years from the date the cause of action arose. Pls.' Opp'n (Civ. No. 03-691) at 3–6; Pls.' Opp'n (Civ. No. 03-888) at 3–6. The court notes that the overwhelming majority of the cases cited involve default judgments, for which any statute of limitations argument was necessarily waived. In only three of those cases was the statute of limitations even mentioned, and those references are dicta given the procedural posture of the case. *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 60 (D.D.C. 2003); *Polhill v. Islamic Republic of Iran*, 2001 U.S. Dist. LEXIS 15322, at *13 n.3 (D.D.C. Aug. 23, 2001); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 68–69 (D.D.C. 1998). In one of the two cases cited by plaintiffs that was not decided by default, the defendant failed to raise the statute of limitations defense and therefore waived it as well. *Kilburn v. Republic of Iran*, 277 F. Supp. 2d 24 (D.D.C. 2003). Finally, in the sole disputed matter cited by plaintiffs in

make clear that the actions in question occurred, and therefore their cause of action arose, by December 9, 1990, at the latest.

Having determined that plaintiffs' claims arose, at the latest, in December 1990, plaintiffs had until December 2000 to file their complaint, absent tolling. None of the complaints in this consolidated matter were filed by that date; the complaint in *Vine*, Civ. No. 01-2674, was filed on December 27, 2001; the complaint in Simon, Civ. No. 03-691, was filed on March 18, 2003; and the complaint in *Seyam*, Civ. No. 03-888, was filed on April 15, 2003. Accordingly, the court must analyze whether any principle[] of equitable tolling" acts to extend the period for filing, such that plaintiffs' claims are not time-barred.

Importantly, the D.C. Circuit has held that equitable tolling "does not bring about an automatic extension of the statute of limitations by the length of the tolling period." *Phillips v. Heine*, 984 F.2d 489, 492 (D.C. Cir. 1993) (citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir. 1990)). Rather, under *Phillips*, even where a plaintiff establishes circumstances justifying equitable tolling, the plaintiff is given extra time to file a claim "*only* if he needs it." *Id.* (emphasis in original). If, however, the plaintiff does not "'need it, there is no

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which the statute of limitations was raised, the court recognized that the statute of limitations began to run at the time the underlying acts occurred, but were tolled until immunity was waived. *Wyatt v. Syrian Arab Republic*, 2005 U.S. Dist. LEXIS 21744, at *35 (D.D.C. 2005). In sum, the cases cited by the *Simon* and *Seyam* plaintiffs are insufficient to convince this court that the statute of limitations on plaintiffs' claims did not begin to run when 28 U.S.C. § 1605(f) says they did, i.e., when "the cause of action arose."

basis for depriving the defendant of the protection of the statute of limitations.'" *Id.* (quoting *Cada*, 920 F.2d at 452). Therefore, in order to "advance [the] important interests in evidentiary accuracy and repose," a deadline will only be tolled "by a reasonable period after the tolling circumstance [is] mended." *Id.*; *see also Chung v. Dep't of Justice*, 333 F.3d 273, 279 (D.C. Cir. 2003) (stating that equitable tolling "merely ensures that the plaintiff is not, by dint of circumstances beyond his control, deprived of a 'reasonable time' in which to file suit.").

Applying these principles, the D.C. Circuit held in *Phillips* that a plaintiff is not entitled to the benefit of the equitable tolling doctrine when the limitations period has not run by the time the plaintiff discovers all the facts necessary to support her claim. For example, in *Phillips*, the plaintiff discovered the necessary facts on February 26, 1990, and the statute of limitations, without any tolling, expired on March 21, 1990. *Id.* Because nothing had prevented the plaintiff "from gathering information in the preceding years," and because "more than three weeks remained" in the limitations period after all the necessary facts were discovered, the D.C. Circuit questioned whether there was "any need to extend the statute at all." *Id.* Accordingly, the D.C.Circuit affirmed the district court's decision to dismiss the case on the ground that it was timebarred. *Id.*; *see also Cada*, 920 F.2d at 453 ("When as here the necessary information is gathered after the claim arose but before the statute of limitations has run, the presumption should be that the plaintiff could bring suit within the statutory period and should have done so.").

As noted above, FSIA was amended in 1996 to allow a plaintiff to pursue a claim against a foreign state for its involvement in certain acts of terrorism. *See* 28 U.S.C. § 1605(f). In doing so, Congress specifically stated that the ten-year limitations period was tolled for "the period during which the foreign state was immune from suit." However, because more than four years remained in the limitations period at the time Iraq's immunity was abrogated, the "presumption" that plaintiffs could have brought suit "within the statutory period" applies. *See Cada*, 920 F.2d at 452; *Phillips*, 984 F.2d at 492. Accordingly, under D.C. Circuit precedent, the fact that Iraq was immune from suit for the first six years of the statutory period applicable to plaintiffs' claims does not give rise to any equitable reason to toll the statutory deadline.[10]

Another principle of equitable tolling, however, *is* applicable here. In 1974, the Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties to the suit had the suit been permitted to continue as a class action." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553–54 (1974); *see also Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983) (affirming that *American Pipe* tolling applies to all asserted members of the class, regardless of whether they

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[10] The court recognizes that Judge Urbina concluded, in *Wyatt v. Syrian Arab Republic*, 2005 U.S. Dist. LEXIS 21744, at *35 (D.D.C. 2005), that a plaintiff was allotted a full ten years after the tolling period to bring her claim under FSIA. As discussed above, this court disagrees, and believes that such a conclusion is inconsistent with the D.C. Circuit's holding in *Phillips*.

choose to file their own suits or to intervene in the pending action).

As described previously, the *Hill* litigation before Judge Jackson was a putative class action whose class, had class certification been granted, would have included all of the plaintiffs in these consolidated matters.[11] As such, *American Pipe*

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[11] Iraq argues that the claims of the "plaintiffs in hiding" were not part of the putative class in *Hill* and thus cannot get the benefit of *American Pipe* tolling. Def.'s Mot. (Civ. No. 01-2674) at 11. The class in *Hill* was described to include "[a]ll American citizens who were present in Iraq or Kuwait at any time between August 2, 1990 through December 1990 and who, during that period, were taken hostage by Defendant." *Id.* (quoting *Hill* Compl. ¶ 41). Therefore, a determination of whether the "plaintiffs in hiding" are included in this class description turns on whether those plaintiffs were "hostages." As the court has already determined that they were, *supra* at 10, Iraq's argument that they may not benefit from *American Pipe* tolling is rejected. Iraq also argues that the claims of the plaintiffs' spouses cannot benefit from the full 18-month period that the motion for class certification in *Hill* was pending, given that their claims were not added until more than seven months after the original *Hill* complaint was filed. This fact, according to Iraq, reduces the *American Pipe* tolling period for the plaintiffs' spouses to a total of eleven months, a period of time assertedly insufficient to make the plaintiffs' spouses claims timely. This argument, however, fails to recognize that amendments adding a spouse's claim for loss of consortium relate back to the date on which the underlying claim was filed. *See, e.g., Costello v. Balzarini*, 2005 U.S. Dist. LEXIS 10392, at *4 (D. Vt. May 24, 2005); *Hoch v. Venture Enters., Inc.*, 473 F. Supp. 541, 542 (D.V.I. 1979); *see also* CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1688 (3d ed. 2001). Moreover, this argument is ultimately irrelevant, given that the court concludes, *infra*, that plaintiffs are not entitled to an automatic extension of the statutory period equal to the time the motion for class certification was pending.

tolling applies.[12] The *Hill* litigation was filed on December 15, 1999, before the statute of limitations expired. On June 29, 2001, Judge Jackson denied the *Hill* plaintiffs' motion for class certification.[13] Plaintiffs insist that the statutory deadline was tolled thereafter for eighteen months and fourteen days—an amount of time equal to the time that the class certification issue was pending—until late 2003. Iraq disagrees, contending that under the holding in *Phillips*, plaintiffs' claims were only equitably tolled for a reasonable amount of time after the class certification issue was resolved, and that by taking almost six months to file their complaint, plaintiffs' delay was unreasonable.

The court agrees with Iraq's legal argument and concludes that the holding in *Phillips*—that "equitable tolling . . . merely ensures that the plaintiff is not, by dint of circumstances beyond his control, deprived of a 'reasonable time' in which to

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[12] Iraq notes that *American Pipe* 12 tolling typically does not apply to class claims in subsequent class actions. The court makes no findings with regard to the viability of plaintiffs' class claims, reserving such a determination until a motion for class certification is ripe. However, the court does note that all plaintiffs' *individual* claims are subject to *American Pipe* tolling, notwithstanding the fact that they also filed class claims. *See, e.g., Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988); *Korwek v. Hunt*, 827 F.2d 874, 878 (2d Cir. 1987); *In re Crazy Eddie Sec. Litig*, 747 F. Supp. 850, 856 (E.D.N.Y. 1990).

[13] In a later filed memorandum opinion, Judge Jackson explained that class certification was denied "in light of the fact that the case was proceeding by default; the uncertainty of the numbers of U.S. citizens who could actually qualify as a victim or claimant; and the significant variations in the experiences of the hostages, including hardships endured and compensable injuries suffered." 175 F. Supp. 2d at 39 n.5.

file suit." *Chung*, 333 F.3d at 279—applies equally to *American Pipe* tolling as well. That is, a plaintiff who would have been a member of a class action, had it been certified, does not receive an automatic extension of the statute of limitations by the length of time that the class certification issue is pending. Instead, the deadline is tolled only "by a reasonable period after the tolling circumstance [is] mended." *Phillips*, 984 F.2d at 492. This conclusion inevitably flows from the D.C. Circuit's holding that equitable tolling does not provide an automatic extension of a statute of limitations and the Supreme Court's recognition that *American Pipe* tolling is a type of equitable tolling, *see Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 n.3 (1990) (citing *American Pipe* as an example of equitable tolling).

While the court agrees with Iraq's legal argument, it disagrees with its factual suggestion that six months was an unreasonable amount of time for the *Vine* plaintiffs to have waited to file their complaint. A number of factors lead this court to this conclusion. First, the *Vine* plaintiffs suggest that Judge Jackson's class certification decision was not "definitive," and that he later encouraged them to "continue to pursue class certification, which he said he would . . . be inclined to grant" had he retained the case. Pls.' Opp'n (Civ. No. 01-2674) at 16–17. Iraq never disputes this claim. Second, and perhaps most importantly, for the eighteen months the class certification motion was pending, and for six months thereafter, Judge Jackson consistently and regularly allowed plaintiffs to amend their complaint to add more named plaintiffs. Under the doctrine of relation back, as embodied in Rule 15(c)

of the Federal Rules of Civil Procedure, the claims of these additional plaintiffs "relate back" to the date of the original complaint for purposes of conducting any statute of limitations analysis. *See Leachman v. Beech Aircraft Corp.*, 694 F.2d 1301, 1308 (D.C. Cir. 1982); *Miller v. Air Line Pilots Ass'n*, 2000 U.S. Dist. LEXIS 8797, at *9 (D.D.C. Mar. 30, 2000). In light of Judge Jackson's pattern of granting such motions to amend, a plaintiff with a similar claim could reasonably have expected to seek compensation for their injuries by participating in the *Hill* litigation. However, in early December 2001, Judge Jackson indicated that he would not allow any more plaintiffs to be added to the *Hill* matter. Within three weeks, the *Vine* plaintiffs filed their complaint in Civil Action No. 01-2674. Given this procedural history, the court believes that the *Vine* plaintiffs acted diligently and filed their complaint within a reasonable time of discovering that they could not be added to the *Hill* litigation. Accordingly, the court believes that equitable tolling is appropriate and their claims are timely.[14]

The plaintiffs in *Simon* and *Seyam*, however, were not so diligent. They waited until 2003 to file their complaint, almost two years after Judge Jackson denied class certification in *Hill* and more than a year after he indicated in writing that he would not allow any more plaintiffs to join the *Hill* litigation. Under the principles espoused in *Phillips*,

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[14] The *Vine* plaintiffs have amended their complaint three times and have moved to add additional plaintiffs on at least two other occasions. As noted above, those plaintiffs' claims are timely under the doctrine of relation back. *Leachman*, 694 F.2d at 1308.

this length of time exceeds what was reasonably necessary and, therefore, precludes the application of equitable tolling. Accordingly, the complaints in *Simon* and *Seyam* are time-barred and must be dismissed.

E. Failure to State a Claim

In their third amended complaint, the *Vine* plaintiffs assert a claim based on federal statutory law, three claims based on federal common law, three claims based on state common law, and four claims based on foreign law. Iraq insists that these claims are either not legally cognizable or are not applicable to the facts at hand, and accordingly moves to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[15] Based on the following analysis, the court agrees in part, and will dismiss the federal statutory and federal common law claims.

1. Federal Statutory Law

Count II of the *Vine* TAC alleges that Iraq violated the so-called Flatow Amendment, through

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[15] A court may grant a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Martin v. Ezeagu*, 816 F. Supp. 20, 23 (D.D.C. 1993) (internal quotations omitted); *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (stating that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). In addition, the court must construe the complaint in a light most favorable to the plaintiff and must accept as true all reasonable factual inferences drawn from well-pleaded factual allegations. *In re United Mine Workers Employee Benefit Plans Litig.*, 854 F. Supp. 914, 915 (D.D.C. 1994); *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979).

which Congress created a specific cause of action against any "official, employee, or agent of a foreign state" for acts over which the court may maintain jurisdiction under the statesponsored terrorism exception to sovereign immunity. 28 U.S.C. § 1605 note. The Flatow Amendment is not a statute of "general application" but instead, by its plain language, limits its scope to "officials or agents of foreign states." *Dammarell v. Islamic Republic of Iran*, 2005 U.S. Dist. LEXIS 5343, *93 (D.D.C. Mar. 29, 2005). Recognizing this limitation, the D.C. Circuit has held that neither the state-sponsored terrorism exception of FSIA, "nor the Flatow Amendment, nor the two considered in tandem, creates a private right of action against a foreign government." *Cicippio-Puleo*, 353 F.3d at 1033. As the sole defendant in the *Vine* matter is a foreign government, and not an official or agent of that foreign government, Iraq moves to dismiss the Flatow Amendment claim in the *Vine* TAC. Despite the fact that the text of the Flatow Amendment does not directly create a cause of action against a government defendant, the *Vine* plaintiffs nonetheless argue that Iraq can be held liable indirectly, by way of § 1606 of FSIA. Section 1606 provides that, as to any claim for relief with respect to which a foreign state is not entitled to immunity, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606.[16] This judicial officer has previously rejected a similar argument

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[16] The effect of section 1606 on the liability of foreign states under the Flatow Amendment was not explicitly addressed in *Cicippeo-Puleo*.

and held that the Flatow Amendment should not be expanded to apply to foreign states through application of § 1606. *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 2006 U.S. Dist. LEXIS 58033, at *35–42 (D.D.C. May 11, 2006). In so holding, this court adopted the reasoned decision of Judge Bates in *Dammarell v. Islamic Republic of Iran*, who had provided four reasons why "the cause of action in the Flatow Amendment cannot be read to apply to foreign states through section 1606": (1) the text of the Flatow Amendment applies only to officials, employees, or agents of a foreign state, not a foreign state itself; (2) the legislative history does not contain any indication that Congress nonetheless intended to create a private cause of action against a foreign state; (3) the statute does not "obviously extend to *private individuals* within the meaning of section 1606," 2005 U.S. Dist. LEXIS 5343, at *97–98 (emphasis added); and (4) such a holding would be "in at least some tension with *Cicippio-Puleo*," *id.* at 97; *see also Holland*, 2005 U.S. Dist. LEXIS 40254, at *41–44 (Kollar-Kotelly, J.) (similarly adopting Judge Bates's reasoning in *Dammarell* and refusing to hold a foreign government liable under the Flatow Amendment).[17]

Today, this court reiterates its agreement with Judge Bates and Judge Kollar-Kotelly and again

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[17] The court notes that Judge Jackson, in *Dodge v. Islamic Republic of Iran*, reached a contrary conclusion and held, without elaboration, that a plaintiff, pursuant to section 1606, may sue a foreign state "under *any* cause of action arising from common law, foreign law, or federal statute which might ordinarily give rise only to individual liability," including the Flatow Amendment. 2004 U.S. Dist. LEXIS 29045, at *12 (D.D.C. Aug. 25, 2004) (emphasis added).

concludes that Congress did not intend to create a cause of action under the Flatow Amendment against foreign states through § 1606 of FSIA. As the D.C. Circuit has stated, "it is for Congress, not the courts, to decide whether a cause of action should lie against foreign states." *Cicippio-Puleo*, 353 F.3d at 1036. In situations where "Congress has not expressly recognized" a cause of action against foreign states, courts should "decline to imply" one. *Id.* Accordingly, the court dismisses the *Vine* plaintiffs' claim against Iraq under the Flatow Amendment.

2. Federal Common Law

Additionally, Iraq argues that the three federal common law claims found in Counts I, VI, and VII must also be dismissed for failure to state a claim. The *Vine* plaintiffs disagree, contending that "it is plain that the complaint states a viable federal common law cause of action against Iraq" in light of the recent decision by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Pls.' Opp'n (Civ. No. 01-2674) at 32. In *Pugh*, this court discussed at length, and rejected, the argument that federal common law provides a viable cause of action against a foreign sovereign under FSIA. *See Pugh*, 2006 U.S. Dist. LEXIS 58033, at *42–49. Specifically, this court noted that, in 2003, the D.C. Circuit "strongly signaled that a federal common law of tort is incompatible with section 1606 of FSIA. . . because section 1606 'instructs [courts] to find the law, not to make it.'" *Id.* at *45 (quoting *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 338 (D.C. Cir. 2003)). As such, the D.C. Circuit's holding "reflect[ed] the modern rule that the federal common

law should only be employed in the rarest of circumstances." *Id.* (quoting *Dammarell*, 2005 U.S. Dist. LEXIS 5343, at *78); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 6.1, at 354 (4th ed. 2003) ("There long has been a strong presumption against the federal courts fashioning common law to decide cases.").

Moreover, this court also rejected the argument that the *Pugh* plaintiffs' allegations fell "within the narrow category of cases that the Supreme Court has recently pronounced to be actionable" in *Sosa*, in large part because *Sosa* arose in the context of the Alien Tort Claims Act ("ATCA"), and not FSIA. *Pugh*, 2006 U.S. Dist. LEXIS 58033, at *47. That difference was "fatal" to the *Pugh* plaintiffs' argument. *Id.* Because FSIA, unlike the ATCA, details "'precisely the sort of claims that a plaintiff may bring when suing under a waiver of immunity provided by the FSIA,'" *id.* (quoting *Dammarell*, 2005 U.S. Dist. LEXIS 5343, at *90), the justification for exercise of federal common law was absent. *Id.* (citing 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4514, at 480–81 (2d ed. 1996) ("Insofar as one important justification for the exercise of federal common law is that Congress has not spoken on the matter before the court, that justification is removed once Congress has spoken on a particular matter.")); *see also City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) (stating that the Supreme Court has "always recognized that federal common law is subject to the paramount authority of Congress" and may be resorted to only "[in] absence of an applicable Act of

Congress") (internal quotations and citations omitted). Because Congress had spoken on the particular matter at issue, by enacting section 1606 of FSIA, this court denied the plaintiffs' request to fashion a cause of action against Iraq under federal common law. *Pugh*, 2006 U.S. Dist. LEXIS 58033, at *48. actionable" in *Sosa*, in large part because *Sosa* arose in the context of the Alien Tort Claims Act ("ATCA"), and not FSIA. *Pugh*, 2006 U.S. Dist. LEXIS 58033, at *47. That difference was "fatal" to the *Pugh* plaintiffs' argument. *Id.* Because FSIA, unlike the ATCA, details "'precisely the sort of claims that a plaintiff may bring when suing under a waiver of immunity provided by the FSIA,'" *id.* (quoting *Dammarell*, 2005 U.S. Dist. LEXIS 5343, at *90), the justification for exercise of federal common law was absent. *Id.* (citing 19 CHARLES ALAN WRIGHT, ARTHUR R.MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4514, at 480–81 (2d ed.1996) ("Insofar as one important justification for the exercise of federal common law is that Congress has not spoken on the matter before the court, that justification is removed once Congress has spoken on a particular matter.")); *see also City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) (stating that the Supreme Court has "always recognized that federal common law is subject to the paramount authority of Congress" and may be resorted to only "[in] absence of an applicable Act of Congress") (internal quotations and citations omitted). Because Congress had spoken on the particular matter at issue, by enacting section 1606 of FSIA, this court denied the plaintiffs' request to fashion a cause of action against

Iraq under federal common law. *Pugh*, 2006 U.S. Dist. LEXIS 58033, at *48. The logic in *Pugh* is equally applicable to this matter. Congress has addressed the claims that are available against a foreign country whose immunity has been waived, by enacting FSIA, and therefore this court may not resort to federal common law. Accordingly, plaintiffs' federal common law claims are dismissed.

3. State Common Law and Foreign Law Claims

In Counts III through IX, the *Vine* plaintiffs asserts three state common law claims—false imprisonment, intentional infliction of emotional distress, and loss of consortium—and four claims based on the law of Iraq and Kuwait. In the wake of the D.C. Circuit's opinion in *Cicippio-Puleo*, district courts in this jurisdiction have uniformly held that state or foreign law may be used to hold foreign states liable for acts of terrorism. *See, e.g.*, *Holland*, 2005 U.S. Dist.LEXIS 40254, at *63–65; *Price v. Socialist People's Libyan Arab Jamahiriya*, 384 F. Supp. 2d 120, 132 (D.D.C. 2005); *Dammarell*, 2005 U.S. Dist. LEXIS 5343, at *55–56.

Iraq contends that these cases are in error, suggesting that Congress preempted state and foreign law by enacting the Flatow Amendment. Def.'s Mot. (Civ. No. 01-2674) at 23–25. Iraq's argument is untenable, for as other courts in this jurisdiction have held, neither the text nor the legislative history of the Flatow Amendment supports the assertion that the Congress intended to "occupy the field" to the exclusion of state or foreign law. *Dammarell*, 2005 U.S. Dist. LEXIS 5343, at *50–53. Rather, "[f]ar from *preempting* state law in section 1605(a)(7) cases, the FSIA *invites*" the

application of state and foreign law "through section 1606." *Id.* at *51 (emphasis in original); *see also Holland*, 2005 U.S. Dist. LEXIS 40254, at *51–52; *Price*, 384 F. Supp. 2d at 132–33. Accordingly, the court denies Iraq's motion to dismiss the *Vine* plaintiffs' state common law and foreign law claims.[18]

III. CONCLUSION

For the aforementioned reasons, it is this 7th day of September, 2006, hereby

ORDERED that Iraq's Motion to Dismiss in Civil Action 01-2674 [#44] is **GRANTED IN PART** and **DENIED IN PART**, as set forth in this Memorandum Opinion; and it is further

ORDERED that Counts I and II of the Third Amended Complaint in Civil Action 01-2674 are **DISMISSED**;

ORDERED that Iraq's Motion to Dismiss in Civil Action 03-691 [#14] is **GRANTED**; and it is further;

ORDERED that Iraq's Motion to Dismiss in Civil Action 03-888 [#14] is **GRANTED**.

Henry H. Kennedy, Jr.
United States District Judge

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[18] In each of the cases cited above, the courts recognized that foreign law was an available avenue of relief under FSIA, but determined, after applying choice of law principles to the facts at hand, that application of state law was more appropriate. This court makes no finding as to whether state law or foreign law should be applied in this case, but rather simply concludes that neither are preempted by the Flatow Amendment. Any choice of law analysis will have to wait until after the parties have briefed the issue.

APPENDIX C

Supreme Court of the United States Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

September 12, 2008

Mr. Jonathan S. Franklin
Fulbright & Jaworksi L.L.P.
801 Pennsylvania Ave., NW
Suite 500
Washington, DC 2004

Re: Republic of Iraq, et al.
v. Robert Simon, et al.
Application No. 08A228

Dear Mr. Franklin:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to The Chief of Justice, who on September 12, 2008 extended the time to and including October 22, 2008.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
by

/s/

Sandy Spagnolo
Case Analyst

APPENDIX D

STATUTORY PROVISIONS INVOLVED

TITLE 28--JUDICIARY AND JUDICIAL PROCEDURE

PART IV--JURISDICTION AND VENUE

CHAPTER 97--JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

Sec. 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

***

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph--

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if--

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

Emergency Wartime Supplemental Authorization Act, Public Law 108-011

Sec. 1503. The President may suspend the application of any provision of the Iraq Sanctions Act of 1990: Provided, That nothing in this section shall affect the applicability of the Iran-Iraq Arms Non-Proliferation Act of 1992 (Public Law 102-484), except that such Act shall not apply to humanitarian assistance and supplies: Provided further, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism: Provided further, That military equipment, as defined by title XVI, section 1608(1)(A) of Public Law 102-484, shall not be exported under the authority of this section: Provided further, That section 307 of the Foreign Assistance Act of 1961 shall not apply with respect to programs of international organizations for Iraq: Provided further, That provisions of law that direct the United States Government to vote against or oppose loans or other uses of funds, including for financial or technical assistance, in international financial institutions for Iraq shall not be construed as applying to Iraq: Provided further, That the President shall submit a notification 5 days prior to exercising any of the authorities described in this section to the committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives: Provided further, That not more than 60 days after enactment of this Act and every 90 days thereafter the President shall submit a

report to the Committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives containing a summary of all licenses approved for export to Iraq of any item on the Commerce Control List contained in the Export Administration Regulations, 15 CFR Part 774, Supplement 1, including identification of end users of such items: Provided further, That the authorities contained in this section shall expire on September 30, 2004, or on the date of enactment of a subsequent Act authorizing assistance for Iraq and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first.

National Defense Authorization Act for Fiscal Year 2008, Public Law 108-011

Sec. 1083. TERRORISM EXCEPTION TO IMMUNITY.

(a) Terrorism Exception to Immunity-

(1) IN GENERAL- Chapter 97 of title 28, United States Code, is amended by inserting after section 1605 the following:

Sec. 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) In General-

(1) NO IMMUNITY- A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD- The court shall hear a claim under this section if--

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II),

either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred--

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) Limitations- An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of--

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) Private Right of Action- A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to--

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an

official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) Additional Damages- After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) Special Masters-

(1) IN GENERAL- The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS- The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) Appeal- In an action brought under this section, appeals from orders not conclusively ending the

litigation may only be taken pursuant to section 1292(b) of this title.

(g) Property Disposition-

(1) IN GENERAL- In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is--

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE- A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY- Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) Definitions- For purposes of this section--

(1) the term `aircraft sabotage' has the meaning given that term in Article 1 of the Convention for the

Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term `hostage taking' has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term `material support or resources' has the meaning given that term in section 2339A of title 18;

(4) the term `armed forces' has the meaning given that term in section 101 of title 10;

(5) the term `national of the United States' has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term `state sponsor of terrorism' means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms `torture' and `extrajudicial killing' have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).'.

(2) AMENDMENT TO CHAPTER ANALYSIS- The table of sections at the beginning of chapter 97 of title 28, United States Code, is amended by inserting after the item relating to section 1605 the following:

1605A. Terrorism exception to the jurisdictional immunity of a foreign state.'.

(b) Conforming Amendments-

(1) GENERAL EXCEPTION- Section 1605 of title 28, United States Code, is amended--

(A) in subsection (a)--

(i) in paragraph (5)(B), by inserting `or' after the semicolon;

(ii) in paragraph (6)(D), by striking `; or' and inserting a period; and

(iii) by striking paragraph (7);

(B) by repealing subsections (e) and (f); and

(C) in subsection (g)(1)(A), by striking `but for subsection (a)(7)' and inserting `but for section 1605A'.

(2) COUNTERCLAIMS- Section 1607(a) of title 28, United States Code, is amended by inserting `or 1605A' after `1605'.

(3) PROPERTY- Section 1610 of title 28, United States Code, is amended--

(A) in subsection (a)(7), by striking `1605(a)(7)' and inserting `1605A';

(B) in subsection (b)(2), by striking `(5), or (7), or 1605(b)' and inserting `or (5), 1605(b), or 1605A';

(C) in subsection (f), in paragraphs (1)(A) and (2)(A), by inserting `(as in effect before the enactment of section 1605A) or section 1605A' after `1605(a)(7)'; and

(D) by adding at the end the following:

(g) Property in Certain Actions-

(1) IN GENERAL- Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of--

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE- Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act

or the International Emergency Economic Powers Act.

(3) THIRD-PARTY JOINT PROPERTY HOLDERS- Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.'.

(4) VICTIMS OF CRIME ACT- Section 1404C(a)(3) of the Victims of Crime Act of 1984 (42 U.S.C. 10603c(a)(3)) is amended by striking `December 21, 1988 with respect to which an investigation or' and inserting `October 23, 1983, with respect to which an investigation or civil or criminal'.

(c) Application to Pending Cases-

(1) IN GENERAL- The amendments made by this section shall apply to any claim arising under section 1605A of title 28, United States Code.

(2) PRIOR ACTIONS-

(A) IN GENERAL- With respect to any action that--

(i) was brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), before the date of the enactment of this Act,

(ii) relied upon either such provision as creating a cause of action,

(iii) has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action against the state, and

(iv) as of such date of enactment, is before the courts in any form, including on appeal or motion under rule 60(b) of the Federal Rules of Civil Procedure,

that action, and any judgment in the action shall, on motion made by plaintiffs to the United States district court where the action was initially brought, or judgment in the action was initially entered, be given effect as if the action had originally been filed under section 1605A(c) of title 28, United States Code.

(B) DEFENSES WAIVED- The defenses of res judicata, collateral estoppel, and limitation period are waived--

(i) in any action with respect to which a motion is made under subparagraph (A), or

(ii) in any action that was originally brought, before the date of the enactment of this Act, under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), and is refiled under section 1605A(c) of title 28, United States Code,

to the extent such defenses are based on the claim in the action.

(C) TIME LIMITATIONS- A motion may be made or an action may be refiled under subparagraph (A) only--

(i) if the original action was commenced not later than the latter of--

(I) 10 years after April 24, 1996; or

(II) 10 years after the cause of action arose; and

(ii) within the 60-day period beginning on the date of the enactment of this Act.

(3) RELATED ACTIONS- If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), any other action arising out of the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after--

(A) the date of the entry of judgment in the original action; or

(B) the date of the enactment of this Act.

(4) PRESERVING THE JURISDICTION OF THE COURTS- Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

(d) Applicability to Iraq-

(1) APPLICABILITY- The President may waive any provision of this section with respect to Iraq, insofar

as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof, if the President determines that--

(A) the waiver is in the national security interest of the United States;

(B) the waiver will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq; and

(C) Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.

(2) TEMPORAL SCOPE- The authority under paragraph (1) shall apply--

(A) with respect to any conduct or event occurring before or on the date of the enactment of this Act;

(B) with respect to any conduct or event occurring before or on the date of the exercise of that authority; and

(C) regardless of whether, or the extent to which, the exercise of that authority affects any action filed before, on, or after the date of the exercise of that authority or of the enactment of this Act.

(3) NOTIFICATION TO CONGRESS- A waiver by the President under paragraph (1) shall cease to be effective 30 days after it is made unless the President has notified Congress in writing of the basis for the waiver as determined by the President under paragraph (1).

(4) SENSE OF CONGRESS- It is the sense of the Congress that the President, acting through the

Secretary of State, should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime against individuals who were United States nationals or members of the United States Armed Forces at the time of those terrorist acts and whose claims cannot be addressed in courts in the United States due to the exercise of the waiver authority under paragraph (1).

(e) Severability- If any provision of this section or the amendments made by this section, or the application of such provision to any person or circumstance, is held invalid, the remainder of this section and such amendments, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.

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No. 08-539

Supreme Court, U.S.
FILED
NOV 24 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

REPUBLIC OF IRAQ, *et al.*,

PETITIONERS,

v.

ROBERT SIMON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that Congress has not expressly or impliedly retroactively divested the courts of jurisdiction over existing cases against Iraq.

2. Whether Petitioners' implausible and unsubstantiated claims—that civil litigation against Iraq for torture and hostage-taking poses a marked threat to U.S.-Iraq relations—warrant Supreme Court intercession, and whether Petitioners' claims are, at least in part, mooted by the agreed-to Status of Forces Agreement.

3. Whether the President can constitutionally exercise both a "pocket veto" and a protective "return veto" (*i.e.*, a "hybrid veto").

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INTRODUCTION

Granting this petition would be to indulge an absurdity: characterizing a handful of civil claims against Iraq as undermining negotiations for the withdrawal of U.S. troops, Petitioners cite no knowledgeable, contemporary authority and persist with this assertion despite the fact that the United States has just completed the Status of Forces Agreement ("SOFA")—the agreement Petitioners deemed impossible—with 27 of 28 Iraqi ministers approving it and Iraq's Parliament poised to pass the agreement.

The countries concluded the agreement concerning a series of negotiated withdrawal dates and criminal jurisdiction without a single statement regarding the alleged detrimental effect of civil litigation in U.S. courts.

Other than the nebulous speculations of Petitioners' attorneys as to what could have happened to negotiations (but did not), Petitioners' brief is a repackaging of arguments already rejected by two esteemed panels of the D.C. Circuit, which found that Congress did not authorize the repeal of jurisdiction as to Iraq in either the 2003 Emergency Wartime Supplemental Appropriations Act or the 2008 National Defense Authorization Act. Further, these holdings are in conflict with no case of this or any other court.

STATEMENT OF THE CASE

1. The *Simon v. Republic of Iraq* plaintiffs are CBS News reporter Bob Simon, cameraman Roberto Alvarez, Mr. Simon's wife Françoise, and Mr. Alvarez's son Robert. Simon and Alvarez were kidnapped by Petitioners on January 21, 1991, while filming the border between Saudi Arabia and Kuwait for a story on the unrest in the Middle East during the Gulf War. Once taken hostage, they were held along with the American POWs in the *Acree* case. Throughout their captivity, they were tortured by Petitioners. They were subjected to prolonged suffering and pain from relentless beatings, sleeping on concrete, cramping, dysentery, starvation, and confinement in near-total darkness. They were used as human shields in a target hit with four 2,000-pound bombs dropped by Coalition forces.

During their imprisonment, they were never permitted to notify their families that they were alive. A Miami newspaper reported that they had been executed, further intensifying the pain endured by their families.

2. The *Seyam v. Republic of Iraq* plaintiffs are the estate of Nabil Seyam and his family. On October 1, 1990, Mr. Seyam, a safety engineer for the Kuwait Metal Pipe Industries Company, who had been hiding from Iraqi forces for two months, was kidnapped and taken hostage by Iraqi soldiers manning a checkpoint in Kuwait. He was used as a human shield in Baghdad and tortured during the lead-up to the war. As an Arab-American, he received especially rough treatment. During his beatings, he was told that if he renounced

his United States citizenship on television, he would be allowed to go free. Seyam refused despite a gun to his head.

3. The *Acree v. Republic of Iraq* plaintiffs are 17 current and former United States military personnel and 37 of their family members.[1] The servicemen were brutally tortured while held as POWs during the 1991 Gulf War. The torture included beatings, electric shock, burns, whipping, starvation, subjection to severe cold and filth, genital inspections to identify Jews, mock executions, and threatened castration and dismemberment. Iraq used the POWs as human shields.

On July 7, 2003, the district court found the Republic of Iraq, Saddam Hussein, and the Iraqi Intelligence Service liable to the *Acree* plaintiffs for compensatory and punitive damages.

The United States moved to intervene and vacate on July 21, 2003—two weeks after the entry of final judgment. The United States claimed that the district court's jurisdiction had been revoked in May 2003 pursuant to authority allegedly conferred upon the President in § 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003, Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579 ("EWSAA"). The district court denied the United States' motion. *Acree v. Republic of Iraq*, 276 F. Supp. 2d 95 (D.D.C. 2003).

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1. The *Acree* plaintiffs are not parties to the proceedings below, but in order to explain the background of Petitioners' argument regarding § 1503 of the Emergency Wartime Supplemental Appropriations Act, it is necessary to explain the history of the *Acree* case.

When Congress had earlier enacted § 1503 on April 16, 2003, there was no government in Iraq for the Secretary of State to certify and thus remove from the State Department's State Sponsors of Terrorism List. Therefore, Congress, in order to free up assistance for Iraq without recourse to the official decertification process, passed § 1503 to give the President the authority to remove statutory obstacles to providing funds and goods to Iraq.

Thereafter, on May 2, 2003, the President sent notification of an intent to invoke § 1503. He did the same in his May 7, 2003 Determination.[2] Only later, on May 22, 2003, in a letter to Congress, did the President assert that he intended to invalidate § 1605(a)(7) of the Foreign Sovereign Immunities Act ("FSIA").[3]

Following the district court's denial of its motion to intervene in *Acree*, the United States appealed. The court of appeals ruled that § 1503 of EWSAA did not affect the jurisdiction of the courts over cases against Iraq under the FSIA's terrorism exception to immunity. *See Acree v. Republic of Iraq*, 370 F.3d 41, 57 (D.C. Cir. 2004).

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2. *See Acree*, 370 F.3d at 57 ("The scope of the May 7 Presidential Determination is immaterial, because it cannot exceed the authority granted in § 1503.").

3. Message to the Congress of the United States (May 22, 2003), http://www.whitehouse.gov/news/releases/2003/05/20030522-16.html (purporting, for the first time, to divest courts of FSIA jurisdiction over cases against Iraq in a Message to Congress).

4. The *Simon* and *Seyam* plaintiffs filed their actions on March 18, 2003 and April 15, 2003, respectively. On January 4, 2005, the Iraqi defendants moved to dismiss the First Amended Complaint in *Simon* and the Second Amended Complaint in *Seyam*. The cases were consolidated with *Vine v. Republic of Iraq* for purposes of the motion to dismiss. On September 7, 2006, the district court dismissed the cases on statute of limitations grounds. Plaintiffs appealed.

5. On December 14, 2007, Congress passed H.R. 1585 (110th Cong. (2007)), titled the National Defense Authorization Act for Fiscal Year 2008 (the "original Act"). In § 1083 of the original Act, Congress amended § 1605 of the FSIA to enhance certain rights of plaintiffs suing foreign terrorist states and clarify the applicable statute of limitations.

On December 19, 2007, following its passage by Congress, the original Act was sent to the President. On December 28, the President, bowing to pressure from Iraq,[4] issued a "Memorandum of Disapproval" announcing that he was exercising a "pocket veto" over the bill.[5] At the same time, the President declared that

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4. "Only after lawyers for the Iraqi government threatened to withdraw $25 billion worth of assets from U.S. capital markets early this week did the White House decide to let the bill die. . . ." Josh Rogin, *At Iraq's Urging, Bush Pocket-Vetoes Defense Authorization Bill*, CQ Today – Defense (Dec. 28, 2007) *at* http://public.cq.com/docs/cqt/news110-000002650500.html.

5. *See* Appendix A at 4a (Memorandum of Disapproval of President George W. Bush (Dec. 28, 2007), *available at* http://www.whitehouse.gov/news/releases/2007/12/20071228-5.html).

in the event the pocket veto was subsequently determined to be ineffective, he intended to exercise a "return veto."[6] The President sent the original Act back to the House with the "Memorandum of Disapproval" (rather than the formal, sealed "Veto Message" that accompanies a return veto) on December 28, 2007.

On January 16, 2008, the House passed H.R. 4986—the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 338 (2008) ("NDAA"), a revised version of the original Act. The revised NDAA retained the earlier version of § 1083 in its entirety, the only difference being that under the NDAA, the President was given the authority to waive, with respect to Iraq, the supplemental rights conferred in § 1083 (*i.e.*, those making it easier to sue terrorist states and to attach property).

On January 23, 2008, Respondents filed a motion at the court of appeals arguing that the President's "hybrid veto" was unconstitutional and consequently the original Act had become law on December 31, 2007.

On January 28, 2008, the President signed the NDAA, and after making the necessary findings as required by Congress as a condition of exercising the waiver, he issued a statement purporting to waive § 1083 as to Iraq.

On February 4, 2008, the court of appeals issued an Order requesting briefing on the issue of the "effect upon the case, if any, of the new Act and of the President's

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6. *See id.*

waiver. In particular, the parties should address whether pending cases filed under former § 1605(a)(7) may proceed on the basis of that provision."

On June 24, 2008, the court of appeals reversed and remanded the *Simon* and *Seyam* cases, ruling that: (1) neither § 1083 nor the President's waiver deprived the courts of jurisdiction over cases which were pending under § 1605(a)(7) when the NDAA went into effect; (2) the cases were timely filed because equitable tolling stopped the running of the statute of limitations; and (3) the "political question doctrine" did not render the cases non-justiciable.

REASONS FOR DENYING THE PETITION

Through a series of legislative enactments, beginning in April 2003 and culminating in January 2008, Congress and the President have so constricted Iraq's potential civil liability that it is now limited to a handful of extant claims, with those few claims exposing Iraq collectively to what is at most a negligible amount of money. Bluntly: no more claims will ever be filed against Iraq for the torturing of U.S. soldiers and citizens and those cases can be settled for nothing of material significance to Iraq. For this reason, the instant action has no bearing on Iraq's reconstruction or the withdrawal of American forces.

Beyond this, there is nothing in the panel's decision which, as a matter of law, is even faintly controversial—nothing which is contrary to the decisions of this or any other court; rather, the opinion below is based on a precise examination of the relevant statute, focusing on

the language of the provision in question and the manner in which that language is informed by the immediately surrounding text. As a matter of statutory interpretation it is conservative and unimpeachable. To overthrow it based on questionable claims about foreign policy would not only offend the honesty and soundness of the panel's effort, but would also violate this Court's longstanding rule that foreign affairs "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Louis Henkin, *Foreign Affairs and the U.S. Constitution* 134 (2d ed. 1996) (quotation omitted).

ARGUMENT

I. *CERTIORARI* SHOULD BE DENIED BECAUSE THIS CASE PRESENTS NO THREAT TO U.S. FOREIGN POLICY INTERESTS.

Petitioners' argument, distended and muddled over ten pages of the Petition, may be distilled down to this: (1) if Iraq is exposed to civil liability, Iraq will retaliate by subjecting American contractors and soldiers to liability in Iraqi courts; (2) that exposure, in turn, will cause a breakdown in the negotiations between Iraq and the United States over the withdrawal of U.S. troops, thereby forcing the United States to remove its troops from Iraq prematurely; and (3) this premature retreat will jeopardize U.S. interests in the Middle East. Pet. 13-22.

This entire construction is a fiction: false in its premises; false in its conclusion. So contrived and farcical is this argument that Petitioners can find not a

single authority, let alone a government official or reputable observer of the negotiations between Iraq and the United States, who actually states any one of these three propositions, let alone all of them chained together. But there is no longer a need for speculation on this subject: the United States and Iraq have just entered an agreement concerning the withdrawal of American forces and criminal jurisdiction over military personnel and contractors; and by no account of the negotiations leading up to the treaty was the panel's decision in this case of any importance.

A. The Decision Below Does Not Threaten The Early Withdrawal Of American Forces.

The reason this case poses no threat to U.S. interests in the negotiations between Iraq and the United States leading up to the recently signed agreement on the withdrawal of U.S. forces, is that beginning in April 2003 and culminating in January 2008, Congress and the President enacted a series of measures which so limited Iraq's potential exposure to civil liability that such liability became a matter of no significance.

Thus, by the time the *Simon* decision was issued in July 2008, neither Iraq nor the United States viewed it as a material impediment, and this is why the careful reader of the Petition will find no quotation from any authority post-*Simon* to the effect that the decision jeopardized the withdrawal of troops.

The following sets forth the chronology of legislation which ended in the capping of all claims against Iraq:

Following Iraq's August 2, 1990 invasion of Kuwait, the U.S. Department of State placed Iraq on the list of terrorist nations.[7] Though sanctions were imposed upon Iraq, it remained immune, as did other sovereign nations, from private suits for terrorist acts. Six years later, the FSIA was amended to permit private suits based on allegations of murder, torture, and kidnapping. That amendment was codified as 28 U.S.C. § 1605(a)(7) (Supp. V 2005).

Immediately prior to the U.S. invasion of Iraq, the President on March 20, 2003 in Executive Order 13,290 confiscated and vested all Iraqi assets frozen in the United States and ordered that the two then-outstanding judgments against Iraq be satisfied.

On October 20, 2004, the United States removed Iraq from the State Department's list of state sponsors of terrorism.[8] Therefore, Iraq could not be liable under § 1605(a)(7) for acts occurring thereafter.

In January 2008, the President, pursuant to the NDAA, permanently banned the filing of all new suits against Iraq. At that point, only six or seven cases were pending against Iraq. This meant that after January 2008, Iraq's potential liability was forever capped at six or seven cases (including *Simon*, *Seyam*, and *Acree*) with likely damages of approximately $1 billion (using Petitioners' generous figure), which, incidentally, is less

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7. *See Determination Iraq*, 55 Fed. Reg. 37,793 (Sept. 13, 1990).

8. *See Rescission of Determination Regarding Iraq*, 69 Fed. Reg. 61,702 (Oct. 20, 2004).

than what Libya paid victims' families in the course of normalization.[9] It was at this point that the civil suits against Iraq ceased to pose a problem for Iraq and, consequently, U.S. foreign policy, and the governments of Iraq and the United States were able to come to an agreement over the withdrawal of U.S. forces without any impediment from *Simon*. Further, Respondents have repeatedly sought to settle their claims with Iraq, including through court-arranged mediation in May 2007, and through Congress. At present, the Justice for Victims of Torture and Terrorism Act (H.R. 5167), which would reasonably resolve the claims for far less than what Iraq claims, is pending before the Senate following House passage in July 2008. Petitioners' arguments

9. Petitioners erroneously claim to know of "no other friendly ally of the United States that has ever been subjected to liability in U.S. courts based on the tortious misdeeds of a formerly hostile regime." Pet. 15. Libya, now friendly and once hostile, was defendant in the cases brought by the Pan Am 103 families. *See, e.g., Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325 (E.D.N.Y.), *aff'd in part and dismissed in part*, 162 F.3d 748 (2d Cir. 1998) (affirming subject matter jurisdiction of district court over case against Libyan government defendants for Pan Am 103 bombing; case settled as part of escrow fund agreement). Facing liability in U.S. courts, Libya ultimately settled through an agreement struck by the United States and Britain. *See* U.S. Department of State Fact Sheet (Sept. 2, 2008), http://www.state.gov/r/pa/prs/ps/2008/sept/109054.htm. Libya accepted responsibility for the actions of its officials in the Pan Am 103 bombing and "established an escrow account of over $1 billion to fund an out-of-court settlement with the Pan Am 103 families." *Id.* Following normalization, Libya was still faced with substantial liability for terrorism and so agreed to the Libyan Claims Resolution Act as a means to settle outstanding claims. The Act was signed into law by the President on August 4, 2008.

regarding uncapped or uncertain future liability, or the inability to finalize agreements are, therefore, not well taken.

In any event, contrary to Petitioners' speculation regarding the potential harm this case poses, civil liability has in the past proven not to be, such as in the case of Libya, an impediment to normalization. In fact, adherence to the rule of law is the *sine qua non* of normal relations.

B. The Decision Below Poses No Threat To The Economic Reconstruction Of Iraq.

Petitioners contend that if the decision below is allowed to stand, it will cost the government of Iraq $1 billion. The Court should not be misled: if the legal context, as demonstrated above, changed radically between 2003 and January 2008, so too did Iraq's economic circumstance. This economic transformation has meant that any liability from the cases pending against Iraq could have no significant impact on that country.

The truth is that Iraq is well able to pay those whom it has tortured: Iraq is currently projected to have a budget surplus of nearly $80 billion.[10] Between 2005 and the end of 2008, Iraq will have taken in more than $156

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10. James Glanz & Campbell Robertson, *As Iraq Surplus Rises, Little Goes Into Rebuilding: Oil Windfall Unspent: Report Says Americans Bear Cost – Billions Sit in a U.S. Bank*, N.Y. Times, Aug. 6, 2008, at A1.

billion in oil revenue alone.[11] At the beginning of 2008, Iraq was estimated to have up to $30 billion invested in U.S. banks.[12] Also, while Iraq claims that there will be catastrophic consequences if it has to compensate those whom it has brutalized, that same country has been repaying billions to its sovereign and commercial creditors since at least 2005.[13]

This paradox should also be noted: Iraq has begun to use the United States courts to sue corporations for billions it alleges it is owed as a result of fraud perpetrated on Iraq by 93 corporate defendants through the United Nations' Oil-for-Food Programme,[14] which means that while Iraq is taking advantage of the U.S. courts to redress its own alleged injuries, it is asking this Court to block U.S. servicemen and civilians from using those same courts to seek compensation for mutilations and traumas inflicted upon them by the Iraqi government and its intelligence services.

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11. *Id.*

12. Richard Cowan, *US senator wants Iraq oil funds used for rebuilding*, Reuters (Mar. 4, 2008 5:48pm EST), http://www.reuters.com/article/featuredCrisis/idUSN04467762 (last visited Oct. 7, 2008).

13. *See, e.g.*, Martin A. Weiss, *Iraq's Debt Relief: Procedure and Potential Implications for International Debt Relief*, Congressional Research Service Report for Congress No. RL33378 (Mar. 31, 2008), http://openers.com/ (search "Iraq's Debt Relief").

14. *See Republic of Iraq v. ABB AG, et al.*, No. 1:2008cv05951 (S.D.N.Y. complaint filed June 27, 2008).

And at bottom, Iraq is a solvent, paying debtor and an active litigant.[15] Iraq's claim that it will suffer catastrophic consequences from compensating Plaintiffs is dated and/or unsubstantiated (that is, based upon speculations, including the 2005 law review article of current real estate associate Amy Falls, which precede the President's waiver in January 2008 capping liability) and, given the circumstances of this case (that is, where the Plaintiffs were the subjects of ineffable degradations), is more than slightly repugnant.

Finally, it is necessary to lance Petitioners' suggestion that the Iraqis are wholly hostile to the idea of reparations and especially reparations to citizens of the United States. Pet. 22. What Petitioners left out of their discussion is that the Iraqis, acknowledging the importance of reparations, have, since 1991, made payments to a worldwide class of individuals, corporations, and governments, including the United States, through the United Nations Compensation Commission ("UNCC"). Iraq has paid over $25 billion in compensation for claims made to the UNCC.[16] Currently, funds to pay the reparations are drawn from the United Nations Compensation Fund, which receives

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15. Petitioners argue at 15 that subjecting the current government to liability for past misdeeds is inappropriate. This runs counter to the bedrock principle of international law that the liabilities of a state are not extinguished with the succession of governments. *See, e.g.*, Restatement (Third) of Foreign Relations Law of the United States § 208 (1987).

16. United Nations Compensation Commission, Status of Processing and Payment of Claims (as of 29 July 2008), http://www2.unog.ch/uncc/status.htm (last visited Nov. 20, 2008).

5% of the revenue generated from the export of Iraqi petroleum and petroleum products.[17] While seeking debt forgiveness and compromises with foreign governments such as Kuwait, Iraqis have embraced the principle of paying reparations to individuals who were victims of the former regime.[18] The United States has been instrumental in the reparations process, not only for Kuwaitis, but also for Iraqi victims of the Baathist regime.[19]

In addition to making reparations, the Iraqi government has also demanded reparations. For example, in 2006, the Iraqis demanded compensation for the deaths of 11 civilians in the village of Ishaqi after a U.S. military investigation cleared U.S. soldiers of

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17. *See* United Nations Compensation Commission, Payment Procedure, http://www2.unog.ch/uncc/paymproc.htm (last visited Nov. 20, 2008).

18. "Many Iraqis are keenly interested in the idea of providing reparations to the victims of severe human rights violations. The Coalition Provisional Authority (CPA) and the Iraqi government both took steps to compensate Iraqi victims of Saddam-era crimes. A 'Higher Council for Reparations to Victims of the Former Regime,' eventually began work in late 2004." International Center for Transitional Justice, Middle East and North Africa: Iraq, http://www.ictj.org/en/where/region5/564.html (last visited Nov. 20, 2008).

19. In 2004, the Coalitional Provisional Authority established a Victims' Compensation Fund for Iraqi victims of the former regime. *See* Amb. Bremer Announces Former Regime Victims' Compensation Fund (26 May 2004), http://govinfo.library.unt.edu/cpa-iraq/transcripts/20040526_bremer_compensation.html.

wrongdoing.[20] In 2007, Iraq demanded $136 million for the families of injured victims of military contractor Blackwater.[21] By April 2007, it was estimated that the families of more than 500 Iraqi civilians killed by U.S. soldiers had requested compensation and, at that time, a third of those were compensated.[22]

Petitioners' notion that the decision below will force Iraqis into the arms of Al-Qaeda is so beyond reason, so ludicrous, that in the two pages of the petition in which the argument is set forth (Pet. 22-23) there is not a single authority cited. This is no basis for granting a petition for *certiorari*.

II. *CERTIORARI* SHOULD BE DENIED BECAUSE THE *SIMON* DECISION IN NO WAY CONFLICTS WITH THE PRECEDENT OF THIS OR ANY OTHER COURT.

Petitioners dedicate little time and effort to discussing § 1083, the provision central to the decision on review, and cite no case law with which *Simon* conflicts.

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20. *See* BBC News, *Iraqis reject US Ishaqi findings*, (Jun 3, 2006), *http://news.bbc.co.uk/1/hi/world/middle_east/5044244.stm*.

21. *See* CBS News, *Iraq Demands $136M Blackwater Payout* (Oct. 8, 2007), http://cbs2.com/national/blackwater.iraq.united.2.340902.html.

22. *See* Human Rights Watch, Iraq: US Data on Civilian Casualties Raises Serious Concerns (Apr. 11, 2007), http://www.hrw.org/ (search "casualties raises concerns").

The two cases Petitioners cite assume the law conferring jurisdiction has actually been repealed. But here, the dispute largely centers on whether the law conferring jurisdiction has actually been repealed. It has not been.

Petitioners also fail to note that this Court clarified and limited *Bruner v. United States*, 343 U.S. 112 (1952), in *Hamdan v. Rumsfeld*, 548 U.S. 557, 576-77 (2006), so as to make it inapplicable to this case. In *Hamdan*, the Supreme Court held that a statute which (a) strips the federal courts of jurisdiction and (b) leaves plaintiffs in pending cases no alternative forum in which to pursue their claims, is solely prospective unless there is express statutory language to the contrary.

In the instant case, where Petitioners have alleged that the waiver provision of § 1083 strips the federal courts of jurisdiction in pending cases, the Plaintiffs have no alternative forum in which to pursue their claims, and there is no express statement in the waiver provision as to the retroactive application of that section.[23] Moreover, in *Bruner*, in direct contrast with

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23. *Hamdan* permits the courts to consider the legislative history of a jurisdiction-stripping statute when determining whether the statute is to be applied retroactively. In the instant case, the statement of Rep. Conyers, Chairman of the House Judiciary Committee, regarding § 1083(d) is directly on point:

> It is important to note that this change does not affect rights under current law. The President's waiver authority extends only to the provisions being newly enacted in this bill; by its clear terms, it

(Cont'd)

the NDAA (and § 1503 of the EWSAA), the statutory provision relating to jurisdiction expressly referred to "jurisdiction" and what cases could not be heard by what court.

The Assessors, on which *Bruner* relied, is also inapposite. In that case, the Court held that inasmuch as the repealing act contained no saving clause, all pending actions fell, as jurisdiction depended entirely upon the act of Congress. *The Assessors v. Osborne*, (9 Wall.) 76 U.S. 567, 575 (1870). That case differs from this case because the Court in *The Assessors* recognized an alternate forum was available. *Id.* at 573-74.

In addition, where, as here, a cause of action would be extinguished, it is beyond contention that Plaintiffs' substantive rights would be impaired. Such a statute that

> retroactively alters the consequences of primary conduct—as by 'impair[ing] rights a party possessed when he acted, increas[ing]

(Cont'd)

> does not extend to current law. There is ongoing litigation . . . under current law; if the President exercises his new waiver authority, that litigation will proceed unaffected by that waiver.
>
> The difference is that, if the President exercises the waiver authority, [current plaintiffs] will not be helped by this new provision we wrote and passed, as we wanted them to be, and as they would be absent the waiver.

154 Cong. Rec. E46, 47 (daily ed. Jan. 17, 2008) (statement of Rep. Conyers).

> a party's liability for past conduct, or impos[ing] new duties with respect to transactions already completed,' *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)—is presumptively non-retroactive; such a statute applies to a pending case only if the Congress clearly so provides.

Simon v. Republic of Iraq, 529 F.3d 1187, 1191 (D.C. Cir. 2008) (alteration in original).

Petitioners also point to the fact that Congress provided transitional rules under § 1605A, asserting that because a case could be re-filed within 60 days, or after a judgment, § 1605(a)(7) must have been repealed. Petitioners' argument makes little sense because it does not explain why a plaintiff would choose to continue to litigate a case to judgment even after the 60-day re-filing period, and only later invoke § 1605A's transitional rule. In short, the better explanation, the explanation that best gives meaning to the multiple parts of the statute and the one espoused by the D.C. Circuit, is that plaintiffs were granted a basket of new rights in the NDAA,[24] but the President's waiver means that existing

24. Section 1605A(c) creates a federal statutory cause of action under § 1605A. In addition, § 1083(a) (new § 1605A(g)) permits a lien of lis pendens on any real property (except diplomatic or consular mission property) or tangible personal property in that judicial district. Section 1083(b) (new § 1610(g)(1)) provides that the property of the foreign state and its agencies and instrumentalities is subject to attachment in aid of execution regardless of the level of control of the state over the entity. Section 1083(b) (new § 1610(g)(2)) provides that property regulated by the United States by reason of economic sanctions shall not be immune from attachment.

plaintiffs against Iraq cannot avail themselves of the newly conferred rights. *See also Simon*, 529 F.3d at 1193 ("There would be no reason for the Congress to have tied the 60-day period in § 1083(c)(3) to the date of 'entry of judgment' in a case pending under § 1605(a)(7) when the NDAA became law if, as Iraq argues, the quoted words mean only a dismissal for want of jurisdiction and the Act requires the dismissal of all pending cases."). Because the retroactive application of the revised Act to pending cases would both (1) abrogate the vested rights of plaintiffs and (2) extinguish the jurisdiction of the federal courts, the Court is required to find—by clear and convincing evidence—that Congress intended these results.[25] Petitioners cannot show that this standard is satisfied.

Finally, if by the President's waiver pending cases filed under former § 1605(a)(7) could not "proceed" on the basis of that provision, then such a waiver would breach the separation of powers between the legislative and judicial branches.

The FSIA is a subject matter jurisdiction-conferring statute. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). If the waiver permitted the President to redraw FSIA jurisdiction, then the President unconstitutionally altered the scope of federal court jurisdiction.

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25. *See QUALCOMM, Inc. v. FCC*, 181 F.3d 1370, 1378 (D.C. Cir. 1999) (holding retroactive impact "impair[ing] rights a party possessed when Congress acted[,]" would require the finding of an "express statement" of Congress' intent to abrogate such rights).

In *Rein v. Socialist People's Libyan Arab Jamahiriya*, the Second Circuit reviewed the district court's decision that § 1605(a)(7) did not unconstitutionally delegate legislative power by allowing the existence of subject matter jurisdiction over foreign sovereigns to depend on the Secretary of State's determination of whether particular foreign states are sponsors of terrorism. 162 F.3d 748, 762 (2d Cir. 1998). The court found there was not an unconstitutional delegation of authority at issue in that case because Libya was already on the list of terrorist sponsors when the 1996 amendments to the FSIA were adopted by Congress. *See id.* at 764. The court, though, went on to endorse that a very different situation would "arise if a state on the list when § 1605(a)(7) was enacted was later dropped from the list. In that scenario, a *plaintiff* could put forth a claim of unduly delegated authority." *Id.* (emphasis in original).

Here, the President, by making findings and thereafter exercising the conditional waiver, would be contracting the courts' jurisdiction. That is, the decision *not* to subject Iraq to the jurisdiction of American courts was made by the executive branch and not Congress because the waiver was not self-executing and required affirmative findings and execution by the President. *Accord Rubin v. Islamic Republic of Iran*, No. 03 C 9370, 2008 U.S. Dist. LEXIS 4651, at *47 (N.D. Ill. Jan. 18, 2008) ("Iran's loss of immunity *was not the result of an executive exercise of delegated authority*, and therefore Iran's separation of powers argument fails.") (emphasis added); *see also Owens v. Republic of Sudan*, 374 F. Supp. 2d 1, 18 (D.D.C. 2005) (stating the executive

"'can neither grant nor curtail federal court jurisdiction.'") (quoting *Carlyle Towers Condo. Ass'n v. FDIC*, 170 F.3d 301, 310 (2d Cir. 1999)).[26]

III. *CERTIORARI* SHOULD BE DENIED BECAUSE THE *ACREE* COURT'S READING OF § 1503 OF THE EWSAA IS CONSISTENT WITH THE PRECEDENT OF THIS COURT.

In enacting § 1503 of the EWSAA, Congress did not grant the President the authority to make FSIA jurisdiction under § 1605(a)(7) inapplicable to Iraq. Iraq's argument to the contrary relies on the language of a proviso contained in § 1503 authorizing the President to make inapplicable to Iraq "section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism."

The *Acree* court interpreted this proviso consistent with the principal text of § 1503[27] and its context within the EWSAA, as an emergency appropriations provision

26. "More than one circuit court has expressed doubts as to whether Congress can constitutionally delegate such a core power as the power to control the jurisdiction of the federal courts." *Rein*, 162 F.3d at 763 (citing *Miller v. FCC*, 66 F.3d 1140, 1144 (11th Cir. 1995); *United States v. Mitchell*, 18 F.3d 1355, 1360 n.7 (7th Cir. 1994)). *See* Steven F. Huefner, *The Supreme Court's Avoidance Of the Nondelegation Doctrine In* Clinton v. City of New York: *More Than "A Dime's Worth of Difference,"* 49 Cath. U. L. Rev. 337, 398-99 (2000).

27. The principal language of § 1503, in its entirety, reads: "The President may suspend the application of any provision of the Iraq Sanctions Act of 1990." 117 Stat. at 579.

designed to sweep away 13 years of accumulated economic sanctions provisions in order to allow reconstruction to begin and permit expenditures connected with Iraq. Petitioners would have this Court believe that the court of appeals gave a narrow reading to the scope of § 1503, when in truth, § 1503 was a far-reaching provision—albeit not a boundless one as Petitioners urge—that removed years of legal barriers to funding and assistance to Iraq.

The court of appeals gave exacting scrutiny to the issue, with the majority finding at least four reasons why § 1503's grant of authority to the President included barriers to assistance, but did not include doing away with jurisdiction. *See Acree*, 370 F.3d at 54-55 (highlighting (1) that the language encompasses obstacles to assistance and does not mention jurisdiction; (2) the legislative history; (3) the temporal scope; and (4) the meaning of § 1503 in the context of the other provisions).

A. Nothing Has Transpired To Suggest The *Acree* Court's Reading Of § 1503 Was Inaccurate.

Petitioners claim the President understood that he had removed jurisdiction, but this is contradicted by the President's contemporaneous May 22, 2003 Executive Order, the Executive's silence following the *Acree* decision in 2004, and the 2008 effort to "re-remove" jurisdiction.

The President's May 22, 2003 Executive Order 13,303 immunized *certain* assets from judicial attachment. Had the President believed he had removed

jurisdiction, including over pending cases, he would not have had to specify which Iraqi property was protected "from judicial process" because all assets would have been immunized by virtue of the removal of jurisdiction. Pet. 4-5.

Thereafter, the *Acree* opinion was published on June 4, 2004, with rehearing *en banc* denied on August 19, 2004 and *certiorari* denied on April 25, 2005. It is even clearer now, four years removed from *Acree*, that the court of appeals was not only correct in its statutory interpretation, but that the counterarguments have far less force. This is so because since that decision, *nothing* has changed—*i.e.*, the President never sought and Congress never gave any clarification of the scope of authority; the President never again acted to divest jurisdiction pursuant to § 1503 of the EWSAA, nor did Congress in any way acquiesce.[28]

In addition, the President's memoranda exercising a waiver of § 1083 of the NDAA with respect to Iraq on January 28, 2008 demonstrate the Executive's recognition that the President did not, under § 1503, ouster federal court jurisdiction over § 1605(a)(7) claims. If the President truly believed his actions in 2003 removed federal court jurisdiction with respect to § 1605(a)(7) claims against Iraq, the Executive's concern would be limited to the possibility of reviving § 1605(a)(7) claims as "related actions" under § 1605A; there would be no cause for concern over foreclosure of defenses in

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28. Contrary to Petitioners' argument (Pet. 31 n.12), Congress made clear in § 1083 that § 1503 did not affect jurisdiction. *Simon*, 529 F.3d at 1193 (stating § 1083(c)(4) "ratifies" the holding in *Acree*.)

cases where the courts would have lacked jurisdiction by way of the President's exercise of authority.[29]

B. The Textualist Approach To Statutory Interpretation Is Particularly Suited To The Layered And Dependent Clauses Of The EWSAA.

The court in *Simon*, relying on *Acree*, used the surrounding language and textual structure of EWSAA as a method of ascertaining the meaning of the statutory phrase "any other provision." 529 F.3d at 1193-94. This method of interpreting statutory language has been consistently endorsed by this Court. *See, e.g., King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (Souter, J.); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 319 (1988) (Scalia, J., concurring) ("Words, like syllables, acquire meaning not in isolation but within their context.").[30]

It was the above approach which the Court in *Acree*—citing *King* and its rationale that no statutory word or phrase, however plain, is intelligible when divorced from its statutory framework—properly

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29. *See* Memorandum of Justification for Waiver of Section 1083 of the National Defense Authorization Act for Fiscal Year 2008 with Respect to Iraq (Jan. 28, 2008) at http://www.whitehouse.gov/news/releases/2008/01/20080128-12.html.

30. *See also* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* (Amy Guttmann ed., 1997).

applied to the phrase "any other provision" as it appeared in EWSAA:

> The difficulty with [the government of Iraq's] view is that it focuses exclusively on the meaning of one clause of § 1503, divorced from all that surrounds it. This approach violates 'the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.'

Acree, 370 F.3d at 52 (quoting *King*, 502 U.S. at 221). Having applied the logic of *King* to the statute before it, the court in *Acree* went on to find that its interpretation of the language and structure of EWSAA was supported by the improbability that Congress would have taken an action so radical as to eliminate the jurisdiction of the federal courts without once referencing the abrogation of jurisdiction. *Id.* at 55-56.

This approach was particularly appropriate and suited to the analysis in *Acree*, where the issue concerned a clause in a string of dependant provisos in a broader appropriations provision. Section 1503 appears in the "General Provisions" of the chapter of a supplemental appropriations bill addressed to "Bilateral Economic Assistance Funds Appropriated to the President." 117 Stat. 559, 572, 579.[31] The language on which Iraq relies is not a free-standing provision, but a subordinate proviso.

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31. *See* Appendix B.

A proviso must be construed in light of the principal or enacting clause of the section. "The general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality and prevent misinterpretation." *United States v. Morrow*, 266 U.S. 531, 534 (1925). "Its grammatical and logical scope is confined to the subject-matter of the principal clause." *Id.* at 534-35. It should not be construed to *enlarge* the principal clause. *See Stearns v. Hertz Corp.*, 326 F.2d 405, 407 (8th Cir. 1964).

The layered and dependent nature of the clause on which Iraq relies requires the style of analysis applied by the court of appeals in order to give it its proper meaning and scope:

> The complete text of § 1503 indicates that the section is concerned with eliminating statutory restrictions on aid and exports needed for Iraq's reconstruction, and not with principles of sovereign immunity or the jurisdiction of U.S. courts. The principal clause of that section provides, "[t]he President may suspend the application of any provision of the Iraq Sanctions Act of 1990." These sixteen words reveal the full intended scope of § 1503; the rest of § 1503 is a series of provisos that explain *how* the President is to suspend that Act.

The Iraq Sanctions Act of 1990 reinforced existing limits on aid and trade involving Iraq. Pub. L. No. 101-513, 104 Stat. 1979 (1990). In particular, it called for full enforcement of § 620A of the Foreign Assistance Act of 1961, 22 U.S.C. § 2371(a) (2000). Section 620A, in turn, bars U.S. foreign assistance to countries designated as supporting terrorism. *See* 22 U.S.C. § 2371(b) (2000).

Once a country has been so designated, though, the process for rescinding that determination is neither quick nor easy. The Secretary of State must provide a report to the House and Senate certifying among other things that the country's government "is not supporting acts of international terrorism" and that it "has provided assurance that it will not support acts of international terrorism in the future . . ." 22 U.S.C. § 2371(c)(1) (2000).

On April 16, 2003, when Congress enacted § 1503, there was no government in Iraq for the Secretary of State to certify. Congress had to free up foreign assistance for Iraq by bypassing the official decertification process and removing § 620A and a host of similar provisions enacted over a decade of increasing hostility to Iraq.[32]

Section 1503 provided a quick fix: it removed section 620A and the most obvious statutory obstacles to providing funds and Western goods.[33]

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32. *See, e.g.*, 22 U.S.C. § 262p-4q (2000) (loans from multilateral lending institutions); 22 U.S.C. § 2349aa-10 (2000) (funds for counterterrorism efforts); 22 U.S.C. § 2377(a) (2000) (development assistance); 22 U.S.C. § 2349aa (2000) (permitting assistance in training, equipment, and "other commodities" to countries not excluded by § 2371).

33. It is contrary to reason that Congress intended to divest courts of FSIA jurisdiction by means of an "any other" clause in a proviso in a supplemental appropriations. Congress does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

In fact, when the Director of the Office of Management and Budget ("OMB"), which prepared the appropriations bill, explained § 1503, he said only that "[t]his provision would repeal the Iraq Sanctions Act of 1990," and that it "would also authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act."[34]

Moreover, as stated above, the NDAA § 1083(c)(4) stated explicitly that "Nothing in section 1503 of the [EWSAA] has ever authorized, directly or indirectly, . . . the removal of the jurisdiction of any court of the United States." 122 Stat. at 3430.

C. Petitioners' Argument That The EWSAA Impliedly Repealed FSIA Jurisdiction Also Fails.

Petitioners, by necessity, argue that § 1503 removed jurisdiction by implication. Pet. 30-34. This argument also fails because implied repeals of jurisdiction are

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34. Appendix C at 22a (explanation by the Director of OMB to the President, forwarded to Speaker Hastert, of the purpose and effect of the § 1503):

> This provision would repeal the Iraq Sanctions Act of 1990, which requires the President to continue an embargo on Iraq and impose certain mandatory sanctions against Iraq, including prohibitions on arms sales, certain exports, foreign assistance and Export-Import Bank Credits. It would also authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act.

intensely disfavored, especially when purportedly effected by appropriations provisions. *TVA v. Hill*, 437 U.S. 153, 189 (1978). As a result, the Supreme Court requires an "'irreconcilable conflict'" between the statutes as textual evidence of an implied repeal. *Red Rock v. Henry*, 106 U.S. 596, 601 (1883).

Here, no intent to repeal jurisdiction, let alone a clear one, can be gleaned from the language of the statute which says not a single word about jurisdiction and does not mention the FSIA. And, no irreconcilable conflict is present as evidenced, at the very least, by the court of appeals' ability to facilely and practically harmonize the interplay between the EWSAA and the FSIA.

Second, courts, when assessing repeal by implication, also look to the intent of the drafters and whether the drafters ascribed a specific purpose to the provision. *See Ford Motor Co. v. Transport Indem. Co.*, 795 F.2d 538, 544 (6th Cir. 1986) (finding implied amendment was "particularly inapt" where Congress "was focusing upon a particular perceived evil."). Here, OMB, the drafter of § 1503 indicated no intent to alter jurisdiction, but did ascribe to § 1503 a very specific purpose—§ 1503 was limited to removing the Iraq Sanctions Act of 1990, section 620A and 620G, and section 307 of the Foreign Assistance Act. Both factors make repeal by implication implausible.

Third, repeal by implication in an appropriations act is even more disfavored. *See TVA v. Hill*, 437 U.S. at 190 ("doctrine disfavoring repeals by implication . . . applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act.") (emphasis in

original). Going one step further, where, as here, there is no evidence of congressional consideration of the specific issue, no debate, commentary, roll calls or the like, and thus no avowed attempt by Congress to alter policy, or even congressional awareness of the potential substantive impact, the presumption applies with even greater force, requiring, in essence, an open and shut case. *See Hodgson v. Bd. of County Comm'rs*, 614 F.2d 601, 614-15 (8th Cir. 1980). Petitioners cannot make out such a case.

IV. IF THE COURT WERE TO GRANT *CERTIORARI*, IT WOULD HAVE TO ADDRESS THE FACT THAT THE ORIGINAL VERSION OF THE NDAA BECAME LAW BECAUSE THE PRESIDENT DID NOT CONSTITUTIONALLY VETO THE ACT.

If Respondents are correct that the original version of the NDAA came into effect (as they urged to the court of appeals), then it is irrelevant how, if at all, § 1083 affects jurisdiction. The President purported to pocket veto the original Act, and if necessary, return veto the original Act. The President's veto was unconstitutional and consequently the original Act had become law on December 31, 2007.

The crux of the argument is that the pocket veto was ineffective because the Senate was still in session, and that the spontaneous return veto, assuming it actually came into existence, would have been ineffective because it was too late, that is, beyond the 10 days in which the Constitution allows it to be exercised. In any

case, the Constitution does not permit such a dual or "hybrid veto."[35]

The pocket veto was invalid for two independent reasons. First, the Supreme Court has plainly ruled that the recess of one house is not an adjournment of Congress. Second, brief recesses do not make Congress unavailable, and as the D.C. Circuit has held, Congress is not unavailable if arrangements are made for the receipt of presidential vetoes during that time.

The President's invocation of and reliance on his "pocket veto" authority was ineffective because the Congress did not adjourn. The Senate had been in *pro forma* session since December 19, 2007. S. Con. Res. 61, 110th Cong. (Dec. 19, 2007) (enacted). To prevent, among other things, recess appointments, Senate Majority Leader Reid kept the Senate in *pro forma* session into January.[36] The House did not adjourn until January 3, 2008. 154 Cong. Rec. H1 (daily ed. Jan. 3, 2008).

In addition, both the House and Senate by chamber rule have appointed their representative (the Clerk of

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35. It is worth noting that the court of appeals appears to have found merit to Respondents' argument, given its characterization that: "President Bush *sought to* 'pocket veto' the bill", rather than stating that he did veto the bill. *Simon*, 529 F.3d at 1190 (emphasis added).

36. *See, e.g.*, Walter Alarkon, *Democrats say Bush can't pocket veto defense bill*, The Hill.com, (Jan. 2, 2008), http://thehill.com/leading-the-news/democrats-say-bush-cant-pocket-veto-defense-bill-2008-01-02.html.

the House and the Secretary of the Senate) to receive communications from the White House during recess or adjournment. *See, e.g.*, Rules of the House of Representatives, Rule (II)(2)(h) (Sept. 14, 2007).

As such, Congress as a whole did not adjourn, nor was Congress unavailable to consider any veto message from the President, a necessary condition to the use of the "pocket veto."

The only authority relied on by the President in support of his purported veto is *The Pocket Veto Case*. That reliance does not support the validity of his action:

In that case, the Supreme Court made clear that the crucial issue as to whether the President could legally exercise a pocket veto was not whether an adjournment was final or interim, but rather, whether it "'prevent[ed]'" the bill's return because it was "impossible to return the bill to either House." 279 U.S. 655, 680-81 (1929). Unlike the instant case, *The Pocket Veto Case* was decided in the context of a five-month adjournment by Congress. The Court ultimately upheld the pocket veto because the multi-month adjournment prevented the bill's return. To the Court, it was not sufficient for the veto message to be delivered to an officer or agent of the House. *See id.* at 683-84. Nine years later in *Wright v. United States*, 302 U.S. 583, 587 (1938), the Court abandoned its holding that the veto message could not be delivered to an agent of Congress. As a result, *The Pocket Veto Case* lends no real support to the President's position.

Though the President asserted that he would exercise a return veto in the event that the pocket veto was rejected by the courts, any return veto would itself be a constitutional nullity. First, Article I, Section 7 identifies only two vetoes (return and pocket) and not three (return, pocket, and hybrid).[37] The Constitution provides for only two choices in the disjunctive.[38] Second, there is nothing in the debate amongst the Founders over Article I, Section 7 to suggest that the Founders had any intention of permitting a hybrid veto. Nor is there any evidence of a custom of hybrid vetoes at the time the Constitution was drafted (indeed there appears to be no record of hybrid vetoes at all). Third, the very criteria of the pocket and return vetoes preclude – as a matter of logic – the existence of a hybrid veto: Because Article I, Section 7 states that 10 days must pass before a pocket veto can come into effect (time in which the Congress could return from adjournment or the President could sign the bill), any determination by the

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37. There are two types of vetoes under article I, section 7: when Congress has adjourned, the President may veto a bill by taking no action, at which point the bill is automatically defeated with the passage of 10 days (the "pocket" veto); if Congress is not adjourned, the President is required to return the bill to the Congress with a statement of his objections (the "return" veto). *See* U.S. Const., art. I, § 7. While the return veto is subject to a vote to override by Congress, the pocket veto is not.

38. *See* Robert J. Spitzer, *The Law: The "Protective Return" Pocket Veto: Presidential Aggrandizement of Constitutional Power*, 31 Presidential Stud. Q. No. 4 (Dec. 2001) ("Presidential claims of simultaneous pocket veto and regular veto . . . are utterly incompatible with each other, because . . . the regular veto and pocket veto are, by constitutional definition and design, mutually exclusive and different acts. . . .").

courts as to whether a pocket veto is valid must necessarily wait until *after* the ten day period has expired. *A fortiori*, a hybrid veto can never be effective since a return veto must be exercised *before* the ten-day period expires. Simply put, the President cannot constitutionally exercise a pocket veto, wait the ten days needed to determine if it is effective, and then, assuming it is not effective, exercise the return veto; at that point, the time in which to exercise the return veto would have passed.

As a result, the President effected neither a pocket veto nor a return veto.

If both the original and revised Act became law – the former because it was improperly vetoed by the President; the latter because Congress acted upon the false assumption that the veto was valid – Respondents would not be subject to a presidential waiver because the original statute granted the President no such authority. To the anticipated objection that the revised Act superseded the original Act, the response is this: a statute does not supersede a prior statute unless there is evidence of clear legislative intent to do so,[39] and here there is no such intent since Congress, when passing the revised Act, did not assume that the original Act had become law. If Congress had, in fact, known that the original Act had come into effect, Congress would have never enacted the revised § 1083 and its waiver provision.[40]

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39. *See, e.g., United States v. Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1985) ("repeals by implication are not favored, and will not be found unless an intent to repeal is clear and manifest.") (citations and quotations omitted); *supra* section III(C).

40. *See, e.g., supra* note 23.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of *certiorari*.

Respectfully submitted,

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November 24, 2008

APPENDIX

APPENDIX A — MEMORANDUM OF DISAPPROVAL DATED DECEMBER 28, 2007

THE WHITE HOUSE
PRESIDENT GEORGE W. BUSH

For Immediate Release
Office of the Press Secretary
December 28, 2007

Memorandum of Disapproval

I am withholding my approval of H.R. 1585, the "National Defense Authorization Act for Fiscal Year 2008," because it would imperil billions of dollars of Iraqi assets at a crucial juncture in that nation's reconstruction efforts and because it would undermine the foreign policy and commercial interests of the United States.

The economic security and successful reconstruction of Iraq have been top priorities of the United States. Section 1083 of H.R. 1585 threatens those key objectives. Immediately upon enactment, section 1083 would risk the freezing of substantial Iraqi assets in the United States – including those of the Development Fund for Iraq (DFI), the Central Bank of Iraq (CBI), and commercial entities in the United States in which Iraq has an interest. Section 1083 also would expose Iraq to new liability of at least several billion dollars by undoing judgments favorable to Iraq, by foreclosing available defenses on which Iraq is relying in pending litigation, and by creating a new Federal cause of action

backed by the prospect of punitive damages to support claims that may previously have been foreclosed. This new liability, in turn, will only increase the potential for immediate entanglement of Iraqi assets in the United States. The aggregate financial impact of these provisions on Iraq would be devastating.

While my Administration objected to an earlier version of this provision in previous communications about the bill, its full impact on Iraq and on our relationship with Iraq has become apparent only in recent days. Members of my Administration are working with Members of Congress to fix this flawed provision as soon as possible after the Congress returns.

Section 1083 would establish unprecedented legal burdens on the allocation of Iraq's funds to where they are most needed. Since the fall of Saddam Hussein, I have issued Executive Orders to shield from entanglement in lawsuits the assets of the DFI and the CBI. I have taken these steps both to uphold international legal obligations of the United States and to remove obstacles to the orderly reconstruction of Iraq. Section 1083 potentially would place these crucial protections of Iraq's core assets in immediate peril, by including a provision that might be misconstrued to supersede the protections I have put in place and to permit the judicial attachment of these funds. Iraq must not have its crucial reconstruction funds on judicial hold while lawyers argue and courts decide such legal assertions.

Moreover, section 1083 would permit plaintiffs to obtain liens on certain Iraqi property simply by filing a notice of pending action. Liens under section 1083 would be automatic upon filing a notice of a pending claim in a judicial district where Iraq's property is located, and they would reach property up to the amount of the judgment plaintiffs choose to demand in their complaints. Such pre-judgment liens, entered before claims are tested and cases are heard, are extraordinary and have never previously been available in suits in U.S. courts against foreign sovereigns. If permitted to become law, even for a short time, section 1083's attachment and lien provisions would impose grave – indeed, intolerable – consequences on Iraq.

Section 1083 also includes provisions that would expose Iraq to increased liability in lawsuits. Contrary to international legal norms and for the first time in U.S. history, a foreign sovereign would be liable for punitive damages under section 1083. Section 1083 removes defenses common for defendants in the United States – including res judicata, collateral estoppel, and statutes of limitation – upon which the Iraqi government has relied. And section 1083 would attempt to revive a $959 million judgment against the new democratic Government of Iraq based on the misdeeds of the Saddam Hussein regime.

Exposing Iraq to such significant financial burdens would weaken the close partnership between the United States and Iraq during this critical period in Iraq's history. If Iraq's assets are frozen, even temporarily, that

could reduce confidence in the Iraqi dinar and undermine the success of Iraq's monetary policy. By potentially forcing a close U.S. ally to withdraw significant funds from the U.S. financial system, section 1083 would cast doubt on whether the United States remains a safe place to invest and to hold financial assets. Iraqi entities would be deterred from engaging in commercial partnerships with U.S. businesses for fear of entangling assets in lawsuits. Section 1083 would be viewed with alarm by the international community and would invite reciprocal action against United States assets abroad.

The adjournment of the Congress has prevented my return of H.R. 1585 within the meaning of Article I, section 7, clause 2 of the Constitution. Accordingly, my withholding of approval from the bill precludes its becoming law. The Pocket Veto Case, 279 U.S. 655 (1929). In addition to withholding my signature and thereby invoking my constitutional power to "pocket veto" bills during an adjournment of the Congress, I am also sending H.R. 1585 to the Clerk of the House of Representatives, along with this memorandum setting forth my objections, to avoid unnecessary litigation about the non-enactment of the bill that results from my withholding approval and to leave no doubt that the bill is being vetoed.

This legislation contains important authorities for the Department of Defense, including authority to provide certain additional pay and bonuses to servicemembers. Although I continue to have serious

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(17) (23)

Nos. 07-1090 & 08-539

IN THE
SUPREME COURT OF THE UNITED STATES

REPUBLIC OF IRAQ,

Petitioner,

v.

JORDAN BEATY, et al.,

Respondents.

REPUBLIC OF IRAQ, et al.,

Petitioners,

v.

ROBERT SIMON, et al.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' MOTION TO STRIKE RESPONDENTS' SUPPLEMENTAL BRIEF

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April 14, 2008

Pursuant to Supreme Court Rule 21, petitioners Republic of Iraq et al. move to strike respondents' supplemental brief filed on April 13, 2009 because it violates Supreme Court Rule 25.5. Whereas the rule permits the filing of a supplemental brief only to present "intervening matter that was not available in time to be included in a [merits] brief," respondents' purported supplemental brief contains no such intervening matter and is simply a sur-reply brief that is not permitted by the rules. All the points addressed in the supplemental brief were covered in petitioners' opening brief, in the United States' brief, and extensively in respondents' own multiple responsive briefs. Respondents are of course entitled to choose new counsel to present oral argument to the Court after briefing has been completed. But that counsel is not thereby entitled to violate the Court's rules by also presenting an unauthorized sur-reply brief only a week before argument.[1]

DISCUSSION

Respondents do not even pretend that their brief involves "intervening matter that was not available in time to be included in a [merits] brief." Sup. Ct. 25.5. Respondents contend only that they are entitled to file a "response" to points made in petitioners' *reply* brief. *See* Supp. Br. 1 (arguing that because "Iraq's reply brief now devotes nine pages to the issue," respondents are entitled to a "supplemental response"); *id.* at 1, 2, 3, 4 (responding to points in the reply brief). But that is the very definition of a sur-reply. Indeed, all the authority cited in the supplemental brief pre-dates the merits briefing in these cases, in one instance by

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1 Given the late date at which respondents filed their brief, petitioners will also be filing a conditional response to that brief for consideration in the event respondents' brief is not stricken.

more than 50 years. If respondents are entitled to file this brief, then *any* respondent would be entitled to file a sur-reply in *any* case without leave of Court (with an attendant sur-sur-reply by petitioners). The rules do not allow this.

What is even worse, the issue addressed in the supplemental brief was expressly covered in petitioners' opening brief, in the brief for the United States, and quite extensively in respondents' two opposition briefs. Respondents expressly *admit* that the issue addressed in their "supplemental brief" was addressed in petitioners' opening brief. *See* Supplemental Br. 1 ("Iraq's opening brief addressed that issue * * *."). It was also addressed in the brief for the United States, which was filed before respondents' merits briefs, *see* U.S. Br. 19-21, and was covered in detail in respondents' *own* two merits briefs (as well as in numerous amicus briefs supporting them). *See* Beaty Resp. Br. 7-25; Simon Br. 42-45, 48-49. Indeed, the *Beaty* respondents devoted almost their entire argument to this issue. Petitioners' reply brief thus devoted far *less* attention to these points than did respondents' own briefs, and all of petitioners' arguments served the precise function of a reply brief: to respond to arguments advanced in respondents' briefs. Respondents may now believe that their original arguments were insufficient, but that does not entitle them to violate the Court's rules—and fundamental fairness—by filing an unauthorized sur-reply only a week before argument.

The Court has denied motions by respondents to file sur-replies even where respondents have forthrightly labeled the briefs as such and sought leave to file them well in advance of oral argument. *See, e.g.*, *Stewart* v. *Dutra Construction Co.*, 542 U.S. 964 (2004); *C & A Carbone, Inc.* v. *Town of Clarkstown*, 510 U.S. 961

(1993). The Court should follow that same course here, where respondents have wrongly invoked Rule 25.5 to file an unauthorized sur-reply that contains not a single "intervening matter that was not available in time to be included in a brief," Sup. Ct. R. 25.5, and in fact addresses issues that were thoroughly addressed in their own merits briefs as well as the preceding briefs.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Court strike respondents' supplemental brief.

Respectfully submitted,

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April 14, 2008

Nos. 07-1090 & 08-539

IN THE
SUPREME COURT OF THE UNITED STATES

REPUBLIC OF IRAQ,

Petitioner,

v.

JORDAN BEATY, et al.,

Respondents.

REPUBLIC OF IRAQ, et al.,

Petitioners,

v.

ROBERT SIMON, et al.,

Respondents.

CERTIFICATE OF SERVICE

I, Jonathan S. Franklin, a member of the Bar of this Court, certify that on this 14th day of April, 2009, a copy of the Petitioners' Motion to Strike Respondents' Supplemental Brief was sent by overnight delivery to:

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I further certify that all parties required to be served have been served.

Jonathan S. Franklin

objections to other provisions of this bill, including section 1079 relating to intelligence matters, I urge the Congress to address the flaw in section 1083 as quickly as possible so I may sign into law the National Defense Authorization Act for Fiscal Year 2008, as modified. I also urge the Congress to ensure that any provisions affecting servicemember pay and bonuses, as well as provisions extending expiring authorities, are retroactive to January 1, 2008.

GEORGE W. BUSH

THE WHITE HOUSE,

December 28, 2007.

APPENDIX B — RELEVANT STATUTE

Emergency Wartime Supplemental Appropriations Act, 2003. Public Law 108–11—Apr. 16, 2003

* * * *

CHAPTER 5
BILATERAL ECONOMIC ASSISTANCE
FUNDS APPROPRIATED TO THE PRESIDENT

* * * *

GENERAL PROVISIONS, THIS CHAPTER

* * * *

SEC. 1503. The President may suspend the application of any provision of the Iraq Sanctions Act of 1990: *Provided*, That nothing in this section shall affect the applicability of the Iran-Iraq Arms Non-Proliferation Act of 1992 (Public Law 102–484), except that such Act shall not apply to humanitarian assistance and supplies: *Provided further*, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism: *Provided further*, That military equipment, as defined by title XVI, section 1608(1)(A) of Public Law 102–484, shall not be exported under the authority of this section: *Provided further*, That section 307 of the Foreign Assistance Act of 1961 shall not apply with

respect to programs of international organizations for Iraq: *Provided further,* That provisions of law that direct the United States Government to vote against or oppose loans or other uses of funds, including for financial or technical assistance, in international financial institutions for Iraq shall not be construed as applying to Iraq: *Provided further,* That the President shall submit a notification 5 days prior to exercising any of the authorities described in this section to the Committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives: *Provided further,* That not more than 60 days after enactment of this Act and every 90 days thereafter the President shall submit a report to the Committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives containing a summary of all licenses approved for export to Iraq of any item on the Commerce Control List contained in the Export Administration Regulations, 15 CFR Part 774, Supplement 1, including identification of end users of such items: *Provided further,* That the authorities contained in this section shall expire on September 30, 2004, or on the date of enactment of a subsequent Act authorizing assistance for Iraq and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first.

APPENDIX C — OMB LETTER DATED MARCH 25, 2003

THE WHITE HOUSE

WASHINGTON

March 25, 2003

Dear Mr. Speaker:

On October 16, 2002, I signed into law the "Authorization for Use of Military Force Against Iraq Resolution of 2002" (Public Law 107-243). After condemning Saddamm Hussein's continued possession of chemical and biological weapons, obstruction of inspections, and brutal repression of the Iraqi people, the Congress affirmed, "Iraq poses a continuing threat to the national security of the United States and international peace and security of the Persian Gulf region and remains in material and unacceptable breach of its international obligations."

Subsequent to enactment of Public Law 107-243, the United Nations Security Council unanimously agreed to Resolution 1441 offering Iraq one final chance to disarm. After more than a decade of deceit and defiance, the regime, yet again, failed to "fully and unconditionally" comply. Iraq continues to pose a grave danger to global peace and security. The United States and our allies must seek to disarm Iraq and liberate the Iraqi people, and we will prevail.

Today, I submit a request for 2003 supplemental appropriations to support Department of Defense operations in Iraq and to strengthen the capabilities of

our friends and allies who will share the burden of military and stabilization activities. Disarming and liberating Iraq is a first step. This request also provides immediate humanitarian relief, support for reconstruction and the development of a free-market democracy in Iraq. Finally, the request will enhance the safety and well-being of Americans at home and abroad with investments managed by the Department of State, the Department of Homeland Security, and other agencies.

This request reflects urgent and essential requirements. Much of the funding has been requested with flexible authorities. This flexibility will ensure requirements can be immediately addressed as they arise despite the unpredictable scope, duration and intensity of operations. I ask the Congress to appropriate the funds as requested, and promptly send the bill to me for signature. I urge the Congress to refrain from attaching items not directly related to the emergency at hand.

This supplemental request provides essential support to guarantee the success and safety of our men and women in uniform, to help enhance the security of America and her citizens, and to establish an Iraqi nation, free, prospering and at peace with her neighbors.

Sincerely,

s/ [illegible]

The Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

Enclosure

Appendix C

Estimate No. 4
108th Congress, 1st Session

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20003

March 25, 2003

The President

The White House

Submitted for your consideration are requests for FY 2003 supplemental appropriations that would provide funds to cover military operations, relief and reconstruction activities in Iraq, ongoing operations in the global war on terrorism, enhancements to the safety of U.S. diplomats and citizens abroad, support for U.S. allies critical to succeeding in the war, and homeland security protection and response measures.

You have made the decision to use all necessary means to enforce multiple U.N. Security Council Resolutions and implement the Joint Congressional Resolution to disarm Iraq. To achieve these objectives, enhance security in the United States, and support crucial friends and allies, the request for supplemental funds includes:

Department of Defense and classified activities

$62.6 billion is requested to address the costs related to military operations against Iraq and sustaining

efforts in the continuing global war on terrorism. The request includes funds for preparatory costs already incurred, the estimated costs associated with military operations against Iraq, and replenishing munitions that are likely to be expended. The proposal also includes funds to support other nations in the global war on terrorism

The request is built on the key assumption that U.S. military action in Iraq will be swift and decisive. We are seeking funds in a consolidated emergency response account which will allow the maximum flexibility to promptly transfer funds as needed to the appropriate agency, service, or account as the war advances. The request includes:

Defense Emergency Response Fund ($59.9 billion)

- *At least $53.4 billion for Military Operations in Iraq.* This amount would cover the costs associated with: the mobilization to active duty of Reserve and National Guard personnel to support military operations on a full-time basis, including pay, travel, per diem, and health care; personnel necessary to maintain critical manning at authorized levels and special pays, such as Imminent Danger Pay, Family Separation Allowance, and Foreign Duty Pay; support for active duty military personnel; and, operations, such as incremental flying hours, ship steaming days, ground operations, special airlift missions, increased associated ship and aircraft maintenance, associated logistics support, fuel

purchases, base support, and reconstruction. These funds also will reimburse accounts used for projects completed or underway that were necessary to prepare for military action in Iraq.

- *Up to $3.7 billion for Munitions Replenishment.* These funds would be used to replenish munitions expended during military operations in Iraq and in the global war on terrorism. These funds could be used to replace precision munitions, ammunition, and other conventional munitions in order to restore inventories to pre-conflict levels.

- *At least $1.7 billion for Classified Activities.* These funds would cover the costs associated with classified activities undertaken in Iraq and in the global war on terrorism.

- *Up to $1.1 billion for Equipment Procurement and Research and Development.* These funds would be used to develop, procure, and upgrade systems necessary to prosecute the global war on terrorism, including operations in Iraq. These systems include command, control, communications, computer and intelligence equipment, chemical and biological detection and decontamination gear, targeting devices, and spare and repair parts needed to keep pace with increased operational tempo.

Appendix C

Other Defense Accounts ($2.7 billion)

- *$1.4 billion to Support Coalition Partners.* These funds would assist key cooperating nations supporting military operations in Iraq and the global war on terrorism.

- *$0.7 billion for Other Programs.* These funds would cover the costs to repair potential damage to Iraqi oil facilities and assure an adequate internal distribution infrastructure. Funds would also continue U.S. efforts to support Colombia's unified campaign against narcotics trafficking and terrorist activities and would continue training of the Afghan National Army.

- *$0.4 billion for Fuel.* This amount would cover the increased cost of fuel.

- *$0.2 billion for Military Construction.* These funds would be used to construct facilities in Guantanamo Bay, the government's focal point for the processing, interrogation, adjudication, and detention of enemy combatants captured in the global war on terrorism. The funds also would cover construction of taxiways, parking aprons at Air Force facilities in the Middle East, and construction of housing and facilities for military and civilian personnel of coalition partners supporting the global war on terrorism.

Appendix C

Department of State

- $296 million is proposed for necessary operating costs for the Department of State, evacuation of U.S. citizens worldwide, and assistance for refugees or internally displaced persons due to the conflict with Iraq.

- *$101 million for Diplomatic and Consular Programs.* These funds would provide for additional operating costs for the Department of State globally, in Iraq, and to enhance worldwide security programs.

- *$66 million for Emergencies in the Diplomatic and Consular Service.* These funds would be used to evacuate U.S. government employees and private citizens and to provide additional services to American citizens should the need arise. Funds would be returned to the Treasury if unused by year's end.

- *$50 million for the U.S. Emergency Refugee and Migration Assistance Fund (ERMA).* These funds would replenish resources to enable this account to respond to urgent, unforeseen refugee and migration events. ERMA funds were used to support international organizations' prepositioning of supplies related to potential conflict.

- *$34 million for the Andean Counterdrug Initiative.* These funds would be used for needed security and counterdrug assistance in Colombia.

- *$25 million for International Narcotics Control and Law Enforcement.* These funds would be used for border security requirements in Pakistan.

- *$20 million for Embassy Security, Construction and Maintenance.* These funds would be used for immediate temporary facilities for State Department and other agency employees in Iraq.

International Assistance Programs

- $5.02 billion is requested to support key coalition partners in the conflict with Iraq and in the global war on terrorism. This request includes:

- *$2.1 billion for Foreign Military Financing.* These funds will strengthen the forces of our partners and allies in military and stabilization operations in Iraq and the ongoing war on terrorism. $1 billion would be made available for Israel to enhance security in light of threats posed by the war with Iraq.

- *$2.4 billion for the Economic Support Fund (ESF).* These funds would provide critical economic support to Jordan, Turkey, Afghanistan, and Egypt and support educational and economic opportunities in the Middle East In addition, loan guarantees will be made available to Israel. Of the total requested for ESF, $40 million would reimburse amounts used to preposition relief and reconstruction supplies and services prior to the conflict.

- *$0.2 billion for Peacekeeping Operations.* These funds would assist coalition partners and front line states supporting operations in Iraq, including funding for follow on stabilization activities.

- *$150 million for the United States Emergency Fund for Complex Foreign Crises.* This contingency fund would be used for a range of unforeseen needs including support for stabilization operations in Iraq. Use of this Fund would require a Presidential determination that a complex emergency exists and that it is in the national interest to use the Fund to respond to it.

- *$120 million for International Disaster Assistance ($80 million) and Child Survival and Health Programs Fund ($40 million).* These resources would reimburse these

accounts for funds used to preposition people, supplies, and commodities prior to the conflict with Iraq.

- *$28 million for Nonproliferation, Anti-Terrorism, Demining and Related Programs.* These funds would be used in Afghanistan for antiterrorism training, protection equipment, and demining, and for antiterrorism training programs in other countries.

- *$22 million for Operating Expenses of the Agency for International Development (USAID).* These funds would help cover the cost of potential evacuations of USAID personnel, fund start-up costs for USAID operations in Iraq, and help cover costs of the USAID Inspector General for auditing reconstruction and relief activities in Iraq.

Broadcasting Board of Governors

- *$30.5 million for International Broadcasting Operations.* These funds would be used to accelerate Middle East Television Network start-up and increase radio broadcasting to Iraq.

Appendix C

Homeland Security Requirements

- $4.25 billion is proposed to address Homeland Security requirements, which includes:

- *$3.5 billion for the Department of Homeland Security.* This would provide $1.5 billion for prevention and response operations of departmental agencies, such as increased border and maritime operations, including Coast Guard support of the Department of Defense; and $2.0 billion for Office for Domestic Preparedness assistance to state and local governments to support federally-coordinated terrorism prevention and security enhancements at this time of heightened threat, and terrorism preparedness for first responders.

- *$500.0 million for the Department of Justice.* These funds would support immediate and emerging terrorism-related prevention and response requirements, including additional intelligence and investigative activities.

- *$250.0 million for the Executive Office of the President's Emergency Response Fund.* These funds would support immediate and emerging terrorism-related prevention and response requirements throughout the federal government.

Appendix C

Specific homeland security requirements must be flexible enough to meet emerging threats or respond to attacks, so precise allocation of these funds cannot be determined in advance. Congressional notification would be provided 15 days prior to any anticipated allocation of funds.

Executive Office of the President (EXOP)

- *$2.4 billion is requested for EXOP for Relief and Reconstruction in Iraq.* This request would fund a new flexible account focused on Iraq relief and reconstruction. $1.7 billion is requested to support reconstruction in the areas of health, water/sanitation, education, electricity, transportation, telecommunications, rule of law/governance, economic and financial policy, and agriculture. $543 million is requested for humanitarian assistance to refugees, internally displaced persons, and vulnerable individuals, including humanitarian demining in and around Iraq. In addition, up to $200 million will be available to replenish accounts drawn down to buy emergency food stocks for the Iraqi people. Flexible authorities for this acccunt will allow quick transfer of funds to all agencies involved in relief and reconstruction as requirements are defined. These funds are in addition to reimbursements for costs already incurred to preposition relief supplies. The total commitment of resources for Iraq relief and reconstruction is approximately $3.5 billion.

This includes funds made available under the Do D heading for oil field repair, contingency accounts, and reimbursement for pre-positioning supplies.

- Additional funding for the Executive Office of the President is discussed under Homeland Security Requirements.

Legislative Branch

- *$125 million is requested for the Legislative Branch.* These funds would support immediate and emerging terrorism-related prevention and response requirements throughout the Legislative Branch.

I have carefully reviewed these proposals and am satisfied that they are necessary at this time. Therefore, I join the heads of the affected Departments and agencies in recommending you transmit the proposals to the Congress.

Sincerely,

s/ Mitchell E. Daniels, Jr.
Mitchell E. Daniels, Jr.
Director

Enclosures

Appendix C

GENERAL PROVISIONS

Sec. ___. *Any appropriation made available in this Act for "International Assistance Programs," for "Department of State," or under the heading, "Iraq Relief and Reconstruction Fund" under "Executive Office of the President," may be transferred between such appropriations for use for any of the purposes for which the funds in the such receiving account may be used: Provided, That the total amount transferred shall not exceed $200,000,000.*

This would allow transfers among the accounts in the International Assistance Programs, the Department of State portions of this request, and the new Iraq Relief and Reconstruction Fund, with a cumulative cap of $200 million. This will allow the President to move funds between accounts to provide the most effective possible aid to the Iraqi people and support to our allies in the conflict in Iraq and the war on terrorism.

Sec. ___. *Assistance or other financing under this Act or under prior foreign operations, export financing, and related programs appropriations Acts may be provided to support relief and reconstruction in Iraq notwithstanding any other provision of law.*

This would extend the authority to provide relief and reconstruction assistance for Iraq "notwithstanding any other provision of law" that is provided in the FY 2003 Consolidated Appropriations Act. The authority in the Consolidated Appropriations Act expires once a supplemental appropriation for Iraq is enacted. This

authority continues to be needed to ensure that relief and reconstruction assistance for Iraq may be provided swiftly and flexibly.

Sec. ___. *The Iraq Sanctions Act of 1990 is hereby repealed: Provided, That nothing in this section shall affect the applicability of the Iran-Iraq Arms Non-Proliferation Act of 1992 (Pub. L. 102-484): Provided further, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, as amended, or other provision of law that applies to countries that have supported terrorism: Provided further, That section 307 of the Foreign Assistance Act of 1961, as amended, shall not apply with respect to programs of international organizations for Iraq: Provided further, That provisions of law that purport to direct the United State Government to vote against or oppose loans or other uses of funds, including for financial or technical assistance, in international financial institutions for Iraq should not be construed as applying to Iraq.*

This provision would repeal the Iraq Sanctions Act of 1990, which requires the President to continue an embargo on Iraq and impose certain mandatory sanctions against Iraq, including prohibitions on arms sales, certain exports, foreign assistance and Export-Import Bank Credits. It would also authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act.

Appendix C

Sec. ___. *Notwithstanding any other provision of law herafter, the President may authorize the export to Iraq of any item subject to the Export Administration Regulations, 15 CFR chapter VII, subchapter C, or controlled under the International Trafficking in Arms Regulations on the United States Munitions List established pursuant to section 38 of the Arms Export Control Act, 22 U.S.C. 2778, if the President determines that the export of such item is in the national interest of the United States.*

This would provide the President with the flexibility to authorize exports to Iraq upon determining that they are in the national interest of the United States, notwithstanding statutory restrictions, in addition to those in the Iraq Sanctions Act, and those under the Arms Export Control Act on exports to Iraq.

No. 08-539

Supreme Court, U.S.
FILED
DEC 10 2008
OFFICE OF THE CLERK

IN THE

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REPUBLIC OF IRAQ, et al.,

Petitioners,

v.

ROBERT SIMON, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

Respondents contend that the question in this case, which is also presented in the *Beaty* case, raises no important issues worthy of this Court's review. But the United States Government, the authoritative voice on this nation's foreign policy, disagrees. In its recent brief in *Beaty* recommending a grant of certiorari, the United States stated that the question "is of exceptional importance to the foreign relations of the United States and the imperative foreign policy objective of fostering a stable, democratic government in Iraq." Brief for the U.S. as Amicus Curiae 22, *Rep. of Iraq* v. *Beaty*, No. 07-1090 (filed Dec. 5, 2008) ("U.S. *Beaty* Amicus Br."). The United States further stated that the erroneous *Acree*

decision—which was followed and expanded upon in this case—"threatens important national priorities with respect to the reconstruction of Iraq" and that "[t]he significant threat posed to Iraq's stability and redevelopment by terrorism-related lawsuits and enforcement actions has not diminished in the intervening years since the *Acree* decision." *Id.* at 17.

Thus, the nations whose foreign relations will be affected by the failure to recognize Iraq's sovereign immunity—Iraq and the United States—agree that the issue is exceptionally important to those relations and should be resolved by this country's highest court. Against that agreement, respondents' arguments seeking to belittle the foreign policy significance of this case ring hollow.

Respondents' attempts to defend the merits of the D.C. Circuit's rulings similarly fail. On the EWSAA issue, the United States thoroughly refutes their arguments, correctly stating that certiorari is warranted in light of the D.C. Circuit's "grave error" that "overturn[ed] the considered judgment of the President under an express grant of authority by Congress." *Id.* at 17 n.1, 1. Respondents likewise fail to justify the D.C. Circuit's ruling that former Section 1605(a)(7)—assuming *arguendo* it was not previously rendered inapplicable—can be the basis for subject matter jurisdiction even though the NDAA expressly *repealed* it. Although the United States finds it unnecessary to reach this issue, it is a jurisdictional issue encompassed by the question presented in both this case and *Beaty*. Therefore, that issue will be before this Court, whether in this case or *Beaty*, in the event it is necessary to reach it to decide the question presented.

Whether Iraq's sovereign immunity has been restored in Saddam-era state sponsor of terrorism cases like this is an exceptionally important question affecting critical U.S. foreign policies and the crucial U.S.-Iraq relationship. Certiorari is warranted.

I. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

The petition explains that the decision below will adversely affect the foreign policy of the United States and its relations with Iraq. Respondents argue that this statement (as they mischaracterize it) is "contrived and farcical" because Iraq purportedly "can find not a single authority" supporting its view. Opp. 8-9. Respondents, however, ignore that the petition itself reflects the considered views of the sovereign foreign government whose relations are directly affected. And the highest "authority" on U.S. foreign policy—the United States Government—has now confirmed that the question presented "is of exceptional importance to the foreign relations of the United States" and that the D.C. Circuit's erroneous resolution of it "threatens important national priorities with respect to the reconstruction of Iraq." U.S. *Beaty* Amicus Br. 22, 17. Respondents are in no position to second-guess the reasoned foreign policy determinations made by either government.

Subjecting a friendly foreign ally to coercive lawsuits based on the misdeeds of a deposed regime is unprecedented, and threatens to unravel the very fabric of international relations. Reciprocity is the basis for sovereign immunity: if the United States subjects a friendly allied nation to lawsuits in its own courts, it can expect the same treatment abroad. Pet. 21-22. And in these particular circumstances, the United States has potentially much to lose in

that bargain. It is principally for this reason that claims between formerly hostile, but now allied, nations have always been resolved diplomatically, through state-to-state negotiations.

Respondents' own arguments reinforce this point. They allege that the Government of Iraq sought compensation for some of the damage inflicted on Iraqi civilians by the United States. Opp. 15-16. But this is how claims of this sort have always been handled—through negotiations between nations rather than by haling a sovereign nation into a foreign nation's court at the behest of private plaintiffs. If Iraq is improperly denied its sovereign immunity in contravention of a Presidential determination, it would not be unreasonable to expect the Iraqi Government to legislate equivalent jurisdiction for Iraq courts, and thereby accord reciprocal treatment to the United States.

Respondents note that Iraq and the United States recently entered into a Status of Forces Agreement ("SOFA"), but misjudge its import. That agreement was negotiated against the backdrop of the U.S. Government's consistent support for Iraq's position that its sovereign immunity was restored in cases like this. And as respondents neglect to mention, the SOFA will be put to a popular referendum in Iraq by July 2009, and a vote of disapproval would void the agreement. *See* Agence France-Presse, *Iraqi Parliament Approves Landmark U.S. Military Pact* (Nov. 27, 2008) (http://news.yahoo.com/s/afp/20081127/wl_mideast_afp/iraqusmilitarywrap).

A denial of Iraq's immunity here could well affect that vote. Indeed, it was reported that opponents of the SOFA in Iraq's Parliament raised concerns about whether "Iraqi assets would continue to be protected

against claims that could not only consume billions of dollars but also make it difficult for Iraq to sell oil and move the proceeds through banks," specifically including pending claims under former Section 1605(a)(7).[1] These opponents, it was reported, sought U.S. Government assurances that Iraq's immunity would be respected. *Id.* The bilateral relationship would be complicated if claims by U.S. plaintiffs against the former Iraqi regime may proceed while reciprocal claims by Iraqis against the United States (which are numerous) may not.[2]

Respondents also point to developments involving Libya, Opp. 11 n.9, but these developments only support the petition's arguments. Although Libya was removed from the list of state sponsors of terrorism, it is far from a friendly U.S. ally. And equally important, the government that sponsored that terrorism—the Khaddafi regime—is still in power. Thus, when the Executive removed Libya from the list, it made clear that this action was expressly subject to "a confirmation from Libya" that Libya would have to respond to the legal cases against it. 71 Fed. Reg. 31,913 (2006). By contrast,

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[1] *See* James Glanz & Steven Myers, *Iraqi Foes of Security Deal Seek to Shield Assets*, N.Y. Times, Nov. 24, 2008, at A6 (concerns included claims "by Americans who were badly treated as prisoners of war or used as 'human shields' against American bombardment in the 1991 war," and claims "that Mr. Hussein was * * * behind the Oklahoma City bombing in 1995 or the World Trade Center attacks on Sept. 11, 2001"). These descriptions cover pending Section 1605(a)(7) cases against Iraq. *See* Pet. 15 n.4.

[2] Nor is it relevant that Iraq asserted unrelated claims in a case unrelated to Section 1605(a)(7). Opp. 13. Like other friendly nations, Iraq may sue (and sometimes be sued, *see* 28 U.S.C. § 1605(a)(2)) regarding commercial activities.

the current cases against Iraq seek to penalize a new, democratic government that the United States is actively supporting.

Respondents belittle the significance of the issue, claiming that potential liability against Iraq of more than $1,000,000,000 is a "negligible amount." Opp. 7. That statement is ridiculous on its face. But regardless, the Court has accepted review in cases implicating foreign policy concerns where the stakes were far lower. *See, e.g., Ministry of Defense & Support for the Armed Forces of the Islamic Rep. of Iran* v. *Elahi*, No. 07-615 (granting petition of Iran, which is not an allied nation, in case involving $2.3 million). And although respondents disparage this liability's impact on Iraq's efforts to rebuild its war-torn nation, the U.S. Government disagrees. As it reiterated only days ago, the "potentially 'crushing liability'" at issue in these cases still poses "a significant threat * * * to Iraq's stability and development," which "would seriously undermine funding for the essential tasks of rebuilding and stabilizing Iraq." U.S. *Beaty* Amicus Br. 22, 14, 17, 13 (quoting *Acree* v. *Rep. of Iraq*, 370 F.3d 41 61 (D.C. Cir. 2004) (Roberts, J., concurring)).

But the adverse foreign policy effects extend far beyond the massive dollar amounts at stake. The Saddam Hussein regime imposed incalculable damage and suffering on the Iraqi people, from whom respondents now seek further retribution. Following the regime's ouster, however, "the foreign policy of the United States changed dramatically from imposing sanctions on the Hussein regime to fostering the creation of a new, stable Iraq." *Id.* at 14. And consistent with bedrock principles of comity and reciprocity that underlie the doctrine of foreign

sovereign immunity, the President—acting with statutory authority—sought to restore Iraq to the community of democratic nations by according it the same respect as other formerly hostile, but now allied, nations.

By erroneously failing to recognize Iraq's immunity, the D.C. Circuit threatened both the foreign policy of the United States and its relations with a crucial ally. A decision of this magnitude warrants review by this country's highest court.

II. THE D.C. CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S PRECEDENTS.

A. The Court Should Consider Both Reasons Supporting Iraq's Sovereign Immunity.

The United States notes that, while certiorari should be granted on the question presented, the Court need not decide whether the NDAA's repeal of former Section 1605(a)(7) eliminated that statute as a basis for subject matter jurisdiction in this case, because "the President's exercise of his authority under EWSAA Section 1503 had *already* permanently rendered Section 1605(a)(7) inapplicable to Iraq." U.S. *Beaty* Amicus Br. 19. Iraq agrees.

However, in the event that the Court (or one or more Justices) finds that the President's EWSAA determination does not resolve the question presented, it would become necessary to determine whether the NDAA rendered former Section 1605(a)(7) inapplicable to this case. Because that issue (like the EWSAA issue) implicates subject matter jurisdiction under 28 U.S.C. § 1330(a), it cannot be waived. Accordingly, while the Court could reverse the judgment in this case or in *Beaty*

on the basis of the EWSAA determination alone, it could not affirm either judgment without also considering the effect of the NDAA's repeal of Section 1605(a)(7).

Therefore, if certiorari is granted—whether in *Beaty*, this case, or both—Iraq will present the NDAA issue as an alternative basis for reversal so that the Court can consider it if necessary. *See* Reply Brief for Petitioner 6-10, *Beaty* v. *Rep. of Iraq*, No. 07-1090 (filed May 5, 2008) ("*Beaty* Cert. Reply Br."). Indeed, the D.C. Circuit decided the issue *sua sponte* in this case on the basis of post-argument briefing alone. And now that the D.C. Circuit has definitively resolved that pure issue of law, there is no reason for this Court to await further developments below.

The Court thus should grant certiorari in both cases or clarify that any grant of certiorari encompasses both (1) the validity of the President's EWSAA determination and (2) the effect, if any, of the NDAA's repeal of Section 1605(a)(7) and the President's waiver. But if certiorari is granted—in either or both cases—Iraq intends to present both arguments to the Court.

B. The D.C. Circuit Manifestly Erred In Invalidating The President's EWSAA Determination.

Little needs to be said about respondents' defense of the D.C. Circuit's *Acree* decision that has not already been said by the United States and Iraq. That decision was manifestly erroneous and should not stand unreviewed.

Respondents first contend that the President never understood that his EWSAA determination had removed Section 1605(a)(7) as a basis for jurisdiction

over Iraq. Opp. 23-24. But the President's own statement and those in the United States' recent brief refute that contention. *See* U.S. *Beaty* Amicus Br. 15 ("To the extent there is any doubt whether Section 1503 encompasses Section 1605(a)(7), the President has made clear his judgment that it does."); *Message to the Congress*, 39 Weekly Comp. Pres. Doc. 647-648 (May 22, 2003).

Respondents next contend that the EWSAA was intended to remove only "the most obvious statutory obstacles to providing funds and Western goods" to Iraq. Opp. 28. But the statute says nothing like that; instead, it granted the President the unfettered authority to make inapplicable as to Iraq "*any* * * * *provision of law* that applies to countries that have supported terrorism." EWSAA § 1503 (emphasis added). As the United States cogently explains, not only does this language encompass former Section 1605(a)(7), but the EWSAA's purposes show that this proviso states an independent rule that necessarily covers more than just "obstacles to assistance and funding for the new Iraqi Government." *Acree*, 370 F.3d at 51. *See* U.S. *Beaty* Amicus Br. 9. Section 1605(a)(7) was one of various sanctions that once applied to Iraq as a state sponsor of terrorism, and the EWSAA expressly authorized the President to make all of them inapplicable to Iraq. This was not an "implied repeal" of anything, Opp. 29-30, but rather an express grant of authority to the President.

Finally, respondents cite NDAA § 1083(c)(4) in passing. Opp. 29. But as both Iraq and the United States have explained, this attempt by later legislators to manufacture "subsequent history" to the EWSAA is inoperative because of the President's NDAA waiver and, in any event, cannot override the

statute's plain language as an expression of the intent of the Congress that passed it. *See* Pet. 31 n.12; *Beaty* Cert. Reply Br. 4-6; U.S. *Beaty* Amicus Br. 18 (Section 1083(c)(4) "should be afforded no weight in interpreting EWSAA Section 1503").

C. A Repealed Statute Does Not Confer Jurisdiction Over This Case.

Respondents also mischaracterize what Congress did in NDAA § 1083. They contend that the normal rule that jurisdictional repealers apply to pending cases cannot apply here because the repeal of Section 1605(a)(7) purportedly removed jurisdiction and left plaintiffs no alternative forum. Opp. 17. But that is not what the NDAA did: Congress simultaneously *replaced* Section 1605(a)(7) with a new jurisdictional provision. As respondents do not dispute, *every* pending case under former Section 1605(a)(7) was made cognizable under new Section 1605A(a)(1), provided plaintiffs follow transitional re-filing rules.

Of course, the President's NDAA waiver had the effect of restoring Iraq's sovereign immunity by eliminating the replacement provision, new Section 1605A(a)(1), as to Iraq. Respondents, however, confuse *Congress's* action in repealing and replacing former Section 1605(a)(7) with the *President's* action in waiving its replacement. In NDAA § 1083(d)(2), Congress expressly authorized the President to issue the waiver and unambiguously provided that it would apply to pending cases.

Thus, the question is whether *Congress's* repeal of Section 1605(a)(7)—which applies to many nations, not just Iraq—is subject to the usual rule that jurisdictional repealers apply to pending cases. Even under respondents' characterization of the law, the

usual rule applies: far from leaving plaintiffs with no other forum as a result of Section 1605(a)(7)'s repeal, Congress simultaneously bestowed a replacement jurisdictional provision that encompasses all pending claims.

Nor is this case like *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 576-77 (2006), which held that a limited divestment of habeas jurisdiction did not apply to pending cases because Congress expressly provided that two accompanying jurisdictional provisions applied to pending cases, thus demonstrating a different intent as to the third. The NDAA evidences no such intent. Respondents' parrot the D.C. Circuit's reliance on NDAA § 1083(c)(3). Opp. 19-20. But this section shows no intent to apply a repealed provision to pending cases. Rather, it allows plaintiffs (who may not have known of the NDAA) to re-file under new Section 1605A after their Section 1605(a)(7) cases are dismissed or, if necessary, after they obtain final judgment in a case involving alternative jurisdictional grounds in addition to Section 1605(a)(7). *See* Pet. 27 n.9.

III. CERTIORARI SHOULD NOT BE DENIED BASED ON ARGUMENTS NOT CONSIDERED BELOW.

Respondents also raise constitutional arguments involving separation-of-powers and the alternative "pocket veto" of the original NDAA bill. Because these arguments were not addressed below, they are no basis for denying certiorari. But they are also meritless.

1. Far from violating separation-of-powers, the EWSAA and NDAA involve the exercise of a power the Executive has long possessed. Prior to the FSIA,

the Executive solely determined whether a nation possessed foreign sovereign immunity, and a court was required to "surrender its jurisdiction" based on that determination. *Rep. of Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945). *See Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488-90 (1983). This case involves a limited restoration of that traditional authority, which lies at the core of the Executive's broad foreign affairs powers. Indeed, the Executive has the power to compromise claims implicating foreign nations even *without* statutory authority. *See* Pet. 34.

2. Respondents' "pocket veto" argument can have no effect on this case. First, the repeal of Section 1605(a)(7) and waiver of Section 1605A were effected under a valid statute—the post-veto NDAA—that was passed by Congress and signed by the President. The President's alternative pocket veto of the original NDAA would only have mattered had Congress voted to override that veto, because the only difference between a pocket veto and a regular "return" veto is that a pocket veto cannot be overridden. Opp. 34 n.37. But rather than even attempt an override, Congress enacted a new statute that is now law.

Second, the President executed a valid return veto. "[T]o avoid unnecessary litigation," he returned the bill to the House of Representatives with a statement of objections—within the ten days provided by the Constitution—"to leave no doubt that the bill [was] being vetoed." *Memorandum to the House of Representatives*, 43 Weekly Comp. Pres. Doc. 1641, 1642 (Dec. 28, 2007). That is all the Constitution requires for a valid return veto. *See* U.S. Const. art.

I § 7 ("he shall return [the bill], with his objections to that House in which it shall have originated").

CONCLUSION

The petition should be granted.

Respectfully submitted,

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(13) (19)

Nos. 07-1090 & 08-539

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

REPUBLIC OF IRAQ,
Petitioner,
v.
JORDAN BEATY, et al.,
Respondents.

REPUBLIC OF IRAQ, et al.,
Petitioners,
v.
ROBERT SIMON, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX
Volume 1 of 2 (Pages 1-218)

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PETITIONS FOR WRITS OF CERTIORARI FILED
FEB. 19, 2008 (07-1090) AND OCT. 22, 2008 (08-539)
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APPENDIX A

General Docket
United States Court of Appeals for DC Circuit

Court of Appeals Docket #: 07-7057	**Docketed:** 04/13/2007
Nature of Suit: 3360 Other Personal Injury	**Termed:** 11/21/2007
Beaty, Robin, et al v. Repub Iraq	
Appeal From: United States District Court for the District of Columbia	

Case Type Information:
1) Civil Private
2) Private
3) -

Originating Court Information:

District: 0090-1 : 03cv00215 — **Lead:** 03cv00215

Court Reporter: William McAllister
Court Reporter: Bryan Wayne
Trial Judge: John D. Bates, U.S. District Judge
Date Filed: 02/10/2003

Date Order/Judgment:	**Date NOA Filed:**
03/20/2007	04/04/2007

* * * * *

Panel Assignment: Not available

* * * * *

Robin Beaty, Austin MaKenzie and Jordan Beaty a minor by her next friend; Linda Barloon, William R. Barloon, Bryan C. Barloon and Rebecca L. Barloon minors by her next friend,

Plaintiffs - Appellees

v.

Republic of Iraq,

Defendant - Appellant

United States of America,

Appellee

* * * * *

06/07/2007	MOTION filed (5 copies) by Appellees Robin Beaty, et al. (certificate of mail service dated 6/6/07) for summary affirmance [1045733-1]. Response due on 6/21/07.

* * * * *

06/14/2007	MOTION filed (5 copies) by Appellant Repub Iraq (certificate

	of mail service dated 6/14/07) to extend time to file [1047183-1] a response to a motion for summary affirmance [1045733-1] until 7/12/07.
06/20/2007	CLERK'S ORDER filed [1048445] granting motion extend time to respond to motion for summary affirmance filed in 07-7057; response to motion for summary affirmance now due 7/12/07; granting motion to extend time to respond to petition for leave to appeal filed in 07-8004; directing clerk to file the lodged response and ordering that upon filing of the petition for initial hearing en banc discussed in motion for an extension of time to respond to motion for summary affirmance in 07-7057, petition for initial hearing en banc will be presented to full court. If the petition is denied, matters pending in 07-7057 and 07-8004 will be set for consideration by the same panel. [Entry Date: 6/20/07] [07-7057, 07-8004]
06/20/2007	PER ABOVE ORDER lodged response [1048440-1] is filed.
06/20/2007	PER ABOVE ORDER lodged reply [1048442-1] is filed.
07/12/2007	SUGGESTION filed (19 copies) by

	Appellant Repub Iraq (certificate of service dated 7/12/07, by federal express overnight delivery) for hearing in banc [1053857-1]. [STYLED AS PETITION FOR INITIAL HEARING EN BANC].
07/12/2007	OPPOSITION filed [1053867-1] (5 copies) by Appellant Repub Iraq (certificate of service dated 7/12/07, by federal express overnight delivery) to a motion for summary affirmance [1045733-1].
	* * * * *
07/23/2007	RESPONSE (styled as "BRIEF FOR THE UNITED STATES AS AMICUS IN SUPPORT OF INITIAL HEARING EN BANC") filed [1057711-1] (5 copies) by USA (certificate of mail service dated 7/23/07).
07/25/2007	SUPPLEMENT (styled as "CORRECTED BRIEF FOR THE UNITED STATES AS AMICUS IN SUPPORT OF INITIAL HEARING EN BANC") to [1057712-1] response [1057711-1] filed by USA (with attached letter describing correction).
07/26/2007	MOTION filed (5 copies) by Appellees Robin Beaty, et al. (certificate of mail service dated 7/25/07) to strike [1057713-1]

	USA's brief in support of initial hearing en banc [1057711-1].
07/30/2007	REPLY filed [1057490-1] (5 copies) by Appellees Robin Beaty, et al. (certificate of mail service dated 7/24/07) to Appellant's response to the motion for summary affirmance [1045733-1].
08/01/2007	OPPOSITION (styled as "OPPOSITION TO APPELLEES' MOTION TO STRIKE BRIEF OF THE UNITED STATES IN SUPPORT OF INITIAL HEARING EN BANC OR, ALTERNATIVELY, MOTION FOR LEAVE TO FILE") filed [1058161-1] (5 copies) by Appellee USA (certificate of mail service dated 8/1/07) to Appellees' motion strike document [1057713-1]. MOTION filed, for leave to file [1058161-2] a response [1057711-1].
08/03/2007	OPPOSITION filed [1058931-1] (5 copies) by Appellant Repub Iraq (certificate of mail service dated 8/3/07) to Appellees' motion strike amicus brief for the United States [1057713-1].
11/06/2007	PER CURIAM ORDER, In Banc, filed [1078597] of the petition for initial hearing en banc, the motion to strike the brief of the United

	States, the oppositions thereto, and the alternative motion for leave to file the brief of the United States, it is ORDERED that the motion to strike the brief of the United States be denied [1057713-1]. It is FURTHER ORDERED that the motion for leave to file the brief of the United States be granted [1058161-2]. It is FURTHER ORDERED that the petition for initial hearing en banc be denied [1053857-1]. *Circuit Judges Brown and Kavanaugh would grant the petition for initial hearing en banc* Before Judges Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, Kavanaugh. [Entry Date: 11/6/07]
11/21/2007	PER CURIAM ORDER filed [1081679] granting motion for summary affirmance filed by Robin Beaty [1045733-1]. The Clerk is directed to withhold issuance of the mandate [1081679-1] pending disposition of any timely petition for rehearing. Before Judges Sentelle, Randolph, Brown. [Entry Date: 11/21/07]
12/18/2007	MOTION filed (5 copies) by Appellant Repub Iraq (certificate of service dated 12/18/07, by mail) to stay issuance of the mandate.

01/11/2008	CLERK'S ORDER filed [1091967] granting the motion to stay the mandate filed by Repub Iraq [1088505-1] until 2/19/08. [Entry Date: 1/11/08]
02/20/2008	LETTER filed by Appellant Repub Iraq informing the court of a petition for writ of certiorari filed in the Supreme Court. [1100780-1]. Certificate of service date 2/20/08.
02/26/2008	LETTER filed by Clerk of Supreme Court. A petition for a writ of certiorari in the above entitled case was filed on 2/19/08 and placed on the docket as case No. 07-1090. [1101270-1]. Certificate of service date 2/26/08.

APPENDIX B

General Docket
United States Court of Appeals for DC Circuit

Court of Appeals Docket #: 06-7175 **Nature of Suit:** 3890 Other Statutory Actions Simon, Robert, et al v. Repub Iraq, et al **Appeal From:** United States District Court for the District of Columbia	**Docketed:** 10/17/2006 **Termed:** 06/24/2008
Case Type Information: **1)** Civil Private **2)** Private **3)** -	
Originating Court Information: **District:** 0090-1 : 03cv00691 **Trial Judge:** Henry H. Kennedy, Junior, U.S. District Judge **Date Filed:** 03/18/2003 **Date Order/Judgment:** 09/07/2006 **Date NOA Filed:** 10/05/2006	**Lead:** 03cv00691
* * * * *	

Panel Assignment:
Panel: DHG DBS JRB
Date of Hearing: 10/12/2007 **Date of Decision:** 06/24/2008 **Date Completed:** 06/24/2008

* * * * *

Robert Simon; Francoise Simon; Roberto Alvarez; Robert Alvarez,

Plaintiffs - Appellants

v.

Republic of Iraq; Iraqi Intelligence Service; Saddam Hussein,

Defendants - Appellees

Ethel Hurst; Spencer Hurst; Mitchell Hurst; Sharon Hurst Duross; Mary Diamond; Gwennth Forde; Victoria Porter; Olga Husbands; Vernon Druses; Randolph Porter; James Mulroy,

Amici Curiae for Appellant

02/23/2007	CLERK'S ORDER filed [1024702] to consolidate cases [1024702-1]. [Entry Date: 2/23/07] [06-7175, 06-7178]

* * * * *

04/30/2007	MOTION lodged (5 copies) (certificate of mail service dated 4/27/07) to allow amicus curiae [1038116-1]. Motion filed by Ethel Hurst in 06-7175, Spencer Hurst in 06-7175, Mitchell Hurst in 06-7175, Sharon Hurst Duross in 06-7175, Mary Diamond in 06-7175, Gwennth Forde in 06-7175, Victoria Porter in 06-7175, Olga Husbands in 06-7175, Vernon Druses in 06-7175, Randolph Porter in 06-7175, and James Mulroy in 06-7175.
	* * * * *
05/07/2007	JOINT BRIEF filed by Appellant Robert Simon, et al. in 06-7175 and Nabil Seyam, et al. in 06-7178 [1039166-1]. Copies: 15. Certificate of personal service date 5/7/07. [06-7175, 06-7178]
05/07/2007	JOINT APPENDIX filed by Appellant Robert Simon, et al. in 06-7175 and Appellant Nabil Seyam, et al. in 06-7178. [1039167-1]. Copies: 10. Certificate of personal service date 5/7/07. [06-7175, 06-7178]
05/14/2007	BRIEF lodged by Movant-Amicus Curiae-Appellant Ethel Hurst, et al. in 06-7175 [1040600-1]. Copies: 15. Certificate of mail service date 5/11/07.
05/21/2007	CLERK'S ORDER filed [1041763] of

	the motion for leave to file motion to participate as amici curiae out of time, and the motion of Ethel Hurst, Spencer Hurst, Mitchell Hurst, Gwennth Forde, Victoria Porter, Olga Husbands, Vernon Druses, Randolph Porter, James Mulroy, Mary Diamond, and Sharon Duross to participate as amici curiae in support of appellants, and it appearing that motions are unopposed, it is ORDERED that the motion for leave to file be granted [1038593-1]. The Clerk is directed to file the lodged motion for leave to participate as amici curiae in support of appellants [1038116-1]. It is FURTHER ORDERED that the motion for leave to participate as amici curiae be granted [1038116-1]. The Clerk is directed to file the lodged brief [1040600-1]. It is FURTHER ORDERED the following revised briefing schedule will now apply [1041763-1]: Appellee's brief due on 6/11/07; Appellant's reply brief due on 6/25/07 in 06-7175. [Entry Date: 5/21/07] [06-7175, 06-7178]
	* * * * *
05/21/2007	PER ABOVE ORDER lodged amicus curiae brief [1040600-1] is filed.
06/18/2007	BRIEF filed by Appellee Repub Iraq

	in 06-7175 [1048192-1]. Copies: 15. Certificate of service date 6/18/07. [06-7175, 06-7178]
06/21/2007	SUPPLEMENT (errata - revised table of authorities) to [1050690-1] appellee's brief [1048192-1] filed by Appellee Repub Iraq in 06-7175.
07/02/2007	REPLY BRIEF lodged by Appellant Robert Simon in 06-7175, Appellant Francoise Simon in 06-7175, Appellant Roberto Alvarez in 06-7175, Appellant Robert Alvarez in 06-7175, Appellant Nabil Seyam in 06-7178, Appellant Ahmad Seyam in 06-7178, Appellant Yusef Seyam in 06-7178, Appellant Melissa Seyam in 06-7178, Appellant Carrie Seyam in 06-7178 [1051596-1]. Copies: 15. Certificate of mail service date 7/2/07. [06-7175, 06-7178]
07/06/2007	CORRECTED REPLY BRIEF filed by Appellant Robert Simon, et al. in 06-7175, Appellant Nabil Seyam, et al. in 06-7178 [1053324-1]. Copies: 15. Certificate of personal service date 7/6/07. [06-7175, 06-7178]
	* * * * *
10/12/2007	ORAL ARGUMENT HELD before Ginsburg, Sentelle, Brown. [06-7175, 06-7178]
	* * * * *

01/23/2008	MOTION lodged (5 copies) by Appellants Robert Simon, et al. in 06-7175, Nabil Seyam, et al. in 06-7178 (certificate of service dated 1/23/08, by hand-delivery) for summary reversal [1095618-1], or, in the alternative, to remand [1095618-2]. [06-7175, 06-7178]
	* * * * *
02/04/2008	PER CURIAM ORDER filed [1096994] directing the parties to file simultaneous briefs of no more than 15 pages by 2/19/08 at 4 p.m. addressing the effect upon this case, if any, of the new Act and of the President's waiver; All submissions must be served by hand (see order for specific details); Dismissing as moot motion for an extension of time filed time by Repub Iraq [1096768-1]. [1096994-1] Before Judges Ginsburg, Sentelle, Brown. [Entry Date: 2/4/08] [06-7175, 06-7178]
	* * * * *
03/14/2008	APPELLANT SUPPLEMENTAL BRIEF [1106318] filed by Robert Alvarez, Roberto Alvarez, Francoise Simon and Robert Simon in 06-7175, Susan El Jaonni, Islamic Society of Wichita, Ahmad Seyam, Carrie Seyam, Melissa Seyam and Yusef Seyam in 06-7178 [Service Date: 03/14/2008] Copies: 15 (Final Brief);

	Pages: 11-15; Disclosure Statement: Previously Filed; Certificate of Parties: Not Applicable to this Filing [06-7175, 06-7178]
03/14/2008	APPELLEE SUPPLEMENTAL BRIEF [1106326] filed by Saddam Hussein, Iraqi Intelligence Service and Republic of Iraq [Service Date: 03/14/2008] Copies: 15 (Final Brief); Pages: 11-15; Disclosure Statement: Previously Filed; Certificate of Parties: Not Applicable to this Filing [06-7175]
	* * * * *
06/24/2008	PER CURIAM JUDGMENT filed [1123355] that the judgment of the district court be reversed and remanded for further proceedings for the reasons in the accompanying opinion. Judge Sentelle, Ginsburg and Brown [06-7175, 06-7178]
06/24/2008	OPINION filed [1123357] (Pages: 20) for the Court by Judge Ginsburg [06-7175, 06-7178]
06/24/2008	CLERK'S ORDER filed [1123358] withholding issuance of the mandate. [06-7175, 06-7178]
07/24/2008	Relief Replaced - MOTION filed [1130219] by Republic of Iraq in 06-7175, 06-7178 to stay mandate in case (Response to Motion served by mail due on 08/08/2008) [Mail

	Service Date: 07/24/2008] Copies: 5 (Motion/Petition); Pages: 12; Word Count for Brief: not applicable; Disclosure Statement: Not Applicable to this Party; Certificate of Parties: Not Applicable to this Filing [06-7175, 06-7178]—[Edited 08/04/2008 by SMC]
08/08/2008	RESPONSE IN OPPOSITION FILED [1132922] by Robert Alvarez, Roberto Alvarez, Francoise Simon and Robert Simon to motion to stay mandate,[1130219-2] [Mail Service Date: 08/08/2008 US mail] Copies: 5 (Motion); Pages: 10; Word Count for Motion: not applicable; Disclosure Statement: Not Applicable to this Party; Certificate of Parties: Not Applicable to this Filing [06-7175]
08/18/2008	REPLY IN SUPPORT OF ITS MOTION TO STAY THE MANDATE FILED [1134208] by Republic of Iraq to response [1132922-2] [Mail Service Date: 08/18/2008] [06-7175]
08/26/2008	PER CURIAM ORDER filed [1135198] granting motion to stay mandate [1130219-2] Judge Sentelle, Ginsburg and Brown [06-7175, 06-7178]
09/16/2008	LETTER filed [1139246] by the Clerk of the Supreme Court of the United States notifying this court that the time for filing a petition for

	writ of certiorari has been extended to: 10/22/2008. [06-7175]
09/18/2008	LETTER filed [1139417] by the Clerk of the Supreme Court of the United States notifying this court that the time for filing a petition for writ of certiorari has been extended to: 10/22/2008. [06-7175]
09/22/2008	MOTION filed [1140102] by appellees Republic of Iraq, et al. in 06-7175, 06-7178 to extend time to stay the mandate through October 22, 2008. (Response to Motion served by mail due on 10/06/2008) [Service Date: 09/22/2008] Copies: 5 (Motion/Petition); Pages: 1-10; Disclosure Statement: Not Applicable to this Party; Certificate of Parties: Not Applicable to this Filing [06-7175, 06-7178]
10/14/2008	PER CURIAM ORDER filed [1143610] granting motion to extend time [1140102-2]. The mandate is hereby stayed until October 22, 2008. Judge Sentelle, Ginsburg and Brown [06-7175, 06-7178]
10/24/2008	LETTER filed [1146019] by the Clerk of the Supreme Court of the United States notifying this court of the following activity in the case before it: A petition for writ of certiorari was filed and placed on the docket as Supreme Court Case

	Number: 08-539, Filed Date: 10/22/2008. [06-7175]
11/06/2008	LETTER FILED [1148604] by Republic of Iraq in 06-7175, 06-7178 from attorney for Republic of Iraq requesting docket be updated regarding Supreme Court filing. [Service Date: 11/06/2008] [06-7175, 06-7178]

APPENDIX C

General Docket
United States Court of Appeals for DC Circuit

Court of Appeals Docket #: 06-7178 **Nature of Suit:** 3890 Other Statutory Actions Islam Scty Wichita, et al v. Repub Iraq, et al **Appeal From:** United States District Court for the District of Columbia	**Docketed:** 10/17/2006 **Termed:** 06/24/2008
Case Type Information: 1) Civil Private 2) Private 3) -	
Originating Court Information: **District:** 0090-1 : 03cv00888 **Trial Judge:** Henry H. Kennedy, Junior, U.S. District Judge **Date Filed:** 04/15/2003	**Lead:** 03cv00888
Date Order/Judgment: 09/07/2006	**Date NOA Filed:** 10/05/2006
* * * * *	

Panel Assignment: **Panel:** DHG DBS JRB **Date of Hearing:** 10/12/2007 **Date of Decision:** 06/24/2008 **Date Completed:** 06/24/2008
Islamic Society of Wichita; Susan El Jaonni, Executor of the Estate of Nabil Seyam; Ahmad Seyam; Yusef Seyam; Melissa Seyam; Carrie Seyam, Plaintiffs - Appellants v. Republic of Iraq; Iraqi Intelligence Service; Saddam Hussein, Defendants - Appellees

* * * * *	
02/23/2007	CLERK'S ORDER filed [1024702] to consolidate cases [1024702-1]. [Entry Date: 2/23/07] [06-7175, 06-7178]
* * * * *	

APPENDIX D

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:03-cv-00215-JDB

BEATY et al v. REPUBLIC OF IRAQ
Assigned to: Judge John D. Bates
Case in other court: USCA-DC, 07-07057
Cause: 28:1331 Fed. Question: Personal Injury

Date Filed: 02/10/2003
Jury Demand: None
Nature of Suit: 360 P.I.: Other
Jurisdiction: Federal Question

Date Filed	#	Docket Text
02/10/2003	1	COMPLAINT against REPUBLIC OF IRAQ (Filing fee $ 150.), filed by LINDA BARLOON, ROBIN BEATY. (Attachments: # 1 Exhibit A)(rje,) Modified on 2/22/2003 (rje,). (Entered: 02/12/2003)
		* * * * *
01/29/2004	4	ORDER INVITING the United States to file a statement of interest in the case; and SETTING a briefing schedule. Signed by Judge John D. Bates on

		1/29/04. (lcjdb1) (Entered: 01/29/2004)
		* * * * *
03/15/2004	5	STATEMENT of interest from UNITED STATES OF AMERICA. (Burgess, Joe) (Entered: 03/16/2004)
		* * * * *
04/14/2004	8	RESPONSE to *STATEMENT OF INTEREST OF THE UNITED STATES* filed by LINDA BARLOON, ROBIN BEATY. (Jones, Nelson) (Entered: 04/14/2004)
05/05/2004	9	REPLY *in Support of Statement of Interest* by UNITED STATES OF AMERICA. (Attachments: # 1)(Tannenbaum, Andrew) (Entered: 05/05/2004)
05/20/2004	10	RESPONSE to *Statement of Interest* filed by LINDA BARLOON, ROBIN BEATY. (Jones, Nelson) (Entered: 05/20/2004)
06/16/2004	11	NOTICE by ROBIN BEATY *Plaintiffs' Notice of Filing of Supplemental Authority* (Jones, Nelson) (Entered: 06/16/2004)
		* * * * *

05/23/2005	20	Third AMENDED COMPLAINT against REPUBLIC OF IRAQ filed by LINDA BARLOON, ROBIN BEATY.(lc,) (Entered: 05/23/2005)
* * * * *		
05/12/2006	24	MOTION to Dismiss *Plaintiffs' Third Amended Complaint* by REPUBLIC OF IRAQ. (Attachments: # 1 Text of Proposed Order)(Martin, Lawrence) (Entered: 05/12/2006)
06/12/2006	25	Memorandum in opposition to re 24 MOTION to Dismiss *Plaintiffs' Third Amended Complaint* filed by LINDA BARLOON, ROBIN BEATY. (Attachments: # 1 Text of Proposed Order Denying Motion to Dismiss)(Jones, Nelson) (Entered: 06/12/2006)
06/12/2006	26	MOTION for Summary Judgment by LINDA BARLOON, ROBIN BEATY. (Attachments: # 1 Exhibit Memorandum In Support of Summary Judgment Motion# 2 Exhibit Plaintiffs Statement of Undisputed Facts# 3 Exhibit Memorandum Opinion# 4 Text of Proposed Order Granting Summary Judgment)(Jones, Nelson) (Entered: 06/12/2006)
* * * * *		

09/22/2006	34	Memorandum in opposition to re 26 MOTION for Summary Judgment *and Reply in Support of Motion to Dismiss* filed by REPUBLIC OF IRAQ. (Attachments: # 1 Exhibit 1 - Presidential Determination 2003-23# 2 Exhibit 2 - Executive Order 13303# 3 Exhibit 3 - Message to the Congress (May 22, 2003)# 4 Exhibit 4 - Presidential Letter (Aug. 28, 2003)# 5 Text of Proposed Order)(Burgoyne, Robert) (Entered: 09/22/2006)
09/22/2006	35	ORDER INVITING the United States to file an updated or supplemental statement of interest in this case. Signed by Judge John D. Bates on 9/22/2006. (lcjdb1) (Entered: 09/22/2006)
* * * * *		
11/17/2006	39	RESPONSE TO ORDER OF THE COURT—*Third Statement of Interest of the United States* filed by UNITED STATES OF AMERICA. (Tannenbaum, Andrew) (Entered: 11/17/2006)
12/01/2006	40	RESPONSE re 39 Response to Order of the Court *(U.S. Statement of Interest)* filed by REPUBLIC OF IRAQ. (Burgoyne,

		Robert) (Entered: 12/01/2006)
		* * * * *
12/08/2006	42	REPLY *Memorandum in Support of Plaintiffs' 26 Motion for Summary Judgment* filed by LINDA BARLOON, ROBIN BEATY. (Jones, Nelson) Modified on 12/11/2006 (lc,). (Entered: 12/08/2006)
		* * * * *
03/20/2007	43	ORDER granting in part and denying in part 24 defendant's motion to dismiss, and granting in part and denying in part 26 plaintiffs' motion for partial summary judgment. Signed by Judge John D. Bates on 3/20/2007. (lcjdb1) (Entered: 03/20/2007)
03/20/2007	44	MEMORANDUM OPINION accompanying 43 Order granting in part and denying in part defendant's motion to dismiss, and granting in part and denying in part plaintiffs' motion for partial summary judgment. Signed by Judge John D. Bates on 3/20/2007. (lcjdb1) (Entered: 03/20/2007)
		* * * * *
04/03/2007	45	MOTION for Certification for

		interlocutory appeal *pursuant to 28 U.S.C. 1292(b)* by REPUBLIC OF IRAQ (Attachments: # 1 Text of Proposed Order)(Burgoyne, Robert) (Entered: 04/03/2007)
04/03/2007		MINUTE ORDER: Upon consideration of 45 Iraq's motion for certification of the Court's March 20, 2007 Memorandum Opinion and Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), it is hereby ORDERED that if the United States desires to submit a statement regarding Iraq's motion, it shall do so by not later than the deadline that LCvR 7(b) establishes for plaintiffs to file their opposition. SO ORDERED. Signed by Judge John D. Bates on 4/3/2007. (lcjdb1) (Entered: 04/03/2007)
04/04/2007	46	NOTICE OF APPEAL as to 44 Memorandum & Opinion, 43 Order on Motion to Dismiss, Order on Motion for Summary Judgment by REPUBLIC OF IRAQ. Filing fee $ 455, receipt number 1158749. Fee Status: Fee Paid. Parties have been notified. (Burgoyne, Robert) (Entered: 04/04/2007)
* * * * *		

04/16/2007		USCA Case Number 07-7057 for 46 Notice of Appeal, filed by REPUBLIC OF IRAQ. (lc,) (Entered: 04/17/2007)
04/17/2007	47	Memorandum in opposition to re 45 MOTION for Certification for interlocutory appeal *pursuant to 28 U.S.C. 1292(b)* filed by LINDA BARLOON, ROBIN BEATY. (Jones, Nelson) (Entered: 04/17/2007)
04/17/2007	48	RESPONSE TO ORDER OF THE COURT *Regarding Defendant's Motion for Certification Pursuant to 28 U.S.C. 1292(b)* filed by UNITED STATES OF AMERICA. (Tannenbaum, Andrew) (Entered: 04/17/2007)
* * * * *		
04/18/2007		MINUTE ORDER: Upon consideration of 49 plaintiffs' motion for an extension of time to file their response to 45 defendant's motion for certification for interlocutory appeal, it is hereby ORDERED that the motion is DENIED as unnecessary. See Fed. R. Civ. P. 6(e); Advisory Committee Notes on the 2005 Amendments. SO ORDERED. Signed by Judge John D. Bates on 4/18/2007. (lcjdb1)

		(Entered: 04/18/2007)
* * * * *		
04/19/2007	51	ORDER granting 45 defendant Iraq's motion to certify for interlocutory appeal 43 the March 20, 2007 Order denying its motion to dismiss. Signed by Judge John D. Bates on 4/19/2007. (lcjdb1) (Entered: 04/19/2007)

APPENDIX E

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:03-cv-00691-HHK

SIMON et al v. REPUBLIC OF IRAQ et al
Assigned to: Judge Henry H. Kennedy
Lead case: 1:01-cv-02674-HHK
Member case: (View Member Case)
Case in other court: USCA-DC, 06-07175
Cause: 28:1602 Foreign Sovereign Immunities Act

Date Filed: 03/18/2003
Date Terminated: 09/12/2006
Jury Demand: None
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: Federal Question

* * * * *

Date Filed	#	Docket Text
03/18/2003	1	COMPLAINT against SADDAM HUSSEIN, IRAQI INTELLIGENCE SERVICE, REPUBLIC OF IRAQ (Filing fee $ 150.) , filed by ROBERT ALVAREZ, ROBERTO ALVAREZ, FRANCOISE SIMON, ROBERT SIMON.

		(Attachments: # 1 Exhibit 1# 2 Affidavit 1)(mpt,) (Entered: 03/19/2003)
		* * * * *
09/14/2004	7	AMENDED COMPLAINT 1 against SADDAM HUSSEIN, IRAQI INTELLIGENCE SERVICE, REPUBLIC OF IRAQ filed by ROBERT ALVAREZ, ROBERTO ALVAREZ, FRANCOISE SIMON, ROBERT SIMON. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C)(nmw,) Modified on 9/16/2004 (lc,). (Entered: 09/14/2004)
		* * * * *
01/04/2005	14	MOTION to Dismiss *the First Amended Complaint* by REPUBLIC OF IRAQ, IRAQI INTELLIGENCE SERVICE. (Attachments: # 1 Exhibit 1)(Martin, Lawrence) (Entered: 01/04/2005)
		* * * * *
01/18/2005	16	Memorandum in opposition to motion re 14 *Dismiss* filed by ROBERT SIMON, FRANCOISE SIMON, ROBERTO ALVAREZ, ROBERT ALVAREZ. (Cavanaugh, Anthony)

		Attachment #1 Text of Proposed Order. Additional attachment(s) added on 1/19/2005 (lc,). (Entered: 01/18/2005)
* * * * *		
01/18/2005	18	MOTION for Leave to File a Brief Amicus Curiae by JAMES S. VINE. (Attachments: # 1 Proposed Amicus Brief# 2 Exhibit A to Brief# 3 Exhibit B to Brief# 4 Text of Proposed Order # 5 Certificate of Service)(lc,) (Entered: 01/24/2005)
* * * * *		
01/28/2005	20	REPLY to opposition to motion re 14 *(Motion to Dismiss)* filed by REPUBLIC OF IRAQ, IRAQI INTELLIGENCE SERVICE. (Martin, Lawrence) (Entered: 01/28/2005)
02/11/2005		MINUTE ENTRY: Court grants motion for leave to file amicus curiae brief 18. Signed by Judge James Robertson on February 11, 2005. (MT) (Entered: 02/11/2005)
02/11/2005	21	AMICUS BRIEF by JAMES S. VINE. (Attachments: # 1 Exhibit A# 2 Exhibit B)(lc,) (Entered: 02/14/2005)

03/22/2005	22	Unopposed MOTION to Consolidate Cases *Vine v. Republic Of Iraq And Seyam v. Republic Of Iraq With This Action* by JAMES S. VINE. (Attachments: # 1 Text of Proposed Order # 2 Tab A)(Wolf, Daniel) (Entered: 03/22/2005)
* * * * *		
05/06/2005		Cases associated. (lc,) (Entered: 05/23/2005)
* * * * *		
06/10/2005	25	REPLY to opposition to motion re 44 *Motion to Dismiss* filed by REPUBLIC OF IRAQ. Associated Cases: 1:01-cv-02674-HHK,1:03-cv-00691-HHK,1:03-cv-00888-HHK(Martin, Lawrence) (Entered: 06/10/2005)
* * * * *		
09/07/2006	29	Memorandum Opinion and Order. Signed by Judge Henry H. Kennedy, Jr., on September 7, 2006. Associated Cases: 1:01-cv-02674-HHK,1:03-cv-00691-HHK,1:03-cv-00888-HHK(FL,) (Entered: 09/07/2006)
09/07/2006	30	Judgment. Signed by Judge Henry H. Kennedy, Jr., on

		September 7, 2006. (FL,) (Entered: 09/07/2006)
10/05/2006	31	NOTICE OF APPEAL by ROBERT SIMON, FRANCOISE SIMON, ROBERTO ALVAREZ, ROBERT ALVAREZ. Filing fee $ 455, receipt number 1021381. Fee Status: Fee Paid. Parties have been notified. (Cavanaugh, Anthony) (Entered: 10/05/2006)
* * * * *		
10/17/2006		USCA Case Number 06-7175 for 31 Notice of Appeal filed by ROBERT SIMON, FRANCOISE SIMON, ROBERTO ALVAREZ,, ROBERT ALVAREZ,. (lc,) (Entered: 10/18/2006)
12/13/2006	32	ORDER of USCA (certified copy) as to 58 Notice of Appeal filed by REPUBLIC OF IRAQ; It is hereby ordered that the motion be granted and this case is hereby dismissed; USCA#06-7177 (jsc) (Entered: 01/23/2007)

APPENDIX F

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:03-cv-00888-HHK

SEYAM et al v. THE REPUBLIC OF IRAQ et al
Assigned to: Judge Henry H. Kennedy
Lead case: 1:01-cv-02674-HHK
Member case: (View Member Case)
Case in other court: USCA-DC, 06-07178
Cause: 28:1602 Foreign Sovereign Immunities Act

Date Filed: 04/15/2003
Date Terminated: 09/12/2006
Jury Demand: None
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: Federal Question

* * * * *

Date Filed	#	Docket Text
04/15/2003	1	COMPLAINT against SADDAM HUSSEIN, THE IRAQI INTELLIGENCE SERVICE, THE REPUBLIC OF IRAQ (Filing fee $ 150.) , filed by AHMAD SEYAM, CARRIE SEYAM, MELISSA SEYAM, NABIL SEYAM,

		YUSEF SEYAM. (Attachments: # 1 Exhibit A# 2 Exhibit B)(rje,) (Entered: 04/16/2003)
* * * * *		
10/08/2004	11	AMENDED COMPLAINT against SADDAM HUSSEIN, THE IRAQI INTELLIGENCE SERVICE, THE REPUBLIC OF IRAQ filed by AHMAD SEYAM, CARRIE SEYAM, MELISSA SEYAM, NABIL SEYAM, YUSEF SEYAM. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C)(td,) (Entered: 10/22/2004)
* * * * *		
12/13/2004	15	NOTICE *OF RELATED CASE* by AHMAD SEYAM, CARRIE SEYAM, MELISSA SEYAM, NABIL SEYAM, YUSEF SEYAM (Smyth, David) (Entered: 12/13/2004)
* * * * *		
12/28/2004	17	NOTICE OF RELATED CASE by CARRIE SEYAM, NABIL SEYAM, AHMAD SEYAM, YUSEF SEYAM, MELISSA SEYAM. Case related to Case No. 01-2674. (lc,) (Entered: 12/28/2004)

01/04/2005	18	MOTION to Dismiss *the Second Amended Complaint* by THE REPUBLIC OF IRAQ, THE IRAQI INTELLIGENCE SERVICE. (Attachments: # 1 Exhibit 1)(Martin, Lawrence) (Entered: 01/04/2005)
* * * * *		
01/18/2005	20	Memorandum in opposition to motion re 18 *dismiss* filed by CARRIE SEYAM, NABIL SEYAM, AHMAD SEYAM, YUSEF SEYAM, MELISSA SEYAM. (Smyth, David) (Entered: 01/18/2005)
01/18/2005	21	Proposed MOTION for Order *denying Defendants' Motion to Dismiss* by CARRIE SEYAM, NABIL SEYAM, AHMAD SEYAM, YUSEF SEYAM, MELISSA SEYAM. (Smyth, David) (Entered: 01/18/2005)
01/21/2005	22	MOTION for Leave to File a Brief Amicus Curiae by JAMES S. VINE. (Attachments: # 1 Certificate of Service# 2 Text of Proposed Order # 3 Proposed Brief Amicus Curiae# 4 Exhibit A to Brief# 5 Exhibit B to Brief)(lc,) (Entered: 01/25/2005)

* * * * *		
01/27/2005		MINUTE ORDER granting 22 Motion for Leave to File Brief Amicus Curiae. Signed by Judge Reggie B. Walton on 1/27/05. (lcrbw1,) (Entered: 01/27/2005)
* * * * *		
01/27/2005	26	AMICUS BRIEF in opposition to defendants motion to dismiss re 18 by JAMES S. VINE. (td,) (Entered: 02/08/2005)
01/28/2005	24	REPLY to opposition to motion re 18 *(Motion to Dismiss)* filed by THE REPUBLIC OF IRAQ, THE IRAQI INTELLIGENCE SERVICE. (Martin, Lawrence) (Entered: 01/28/2005)
* * * * *		
03/22/2005	29	Unopposed MOTION to Consolidate Cases *Vine v. Republic Of Iraq And Simon v. Republic Of Iraq* by JAMES S. VINE. (Attachments: # 1 Text of Proposed Order)(Wolf, Daniel) (Entered: 03/22/2005)
* * * * *		
05/06/2005		MINUTE ORDER granting 29

		Unopposed MOTION to Consolidate Cases Vine v. Republic Of Iraq And Simon v. Republic Of Iraq and 30 Motion to Stay. (Kennedy, Henry) (Entered: 05/06/2005)
05/06/2005		Cases associated. (lc,) (Entered: 05/23/2005)
* * * * *		
06/10/2005	31	REPLY to opposition to motion re 44 *Motion to Dismiss* filed by REPUBLIC OF IRAQ. Associated Cases: 1:01-cv-02674-HHK,1:03-cv-00691-HHK,1:03-cv-00888-HHK(Martin, Lawrence) (Entered: 06/10/2005)
* * * * *		
09/07/2006	35	Memorandum Opinion and Order. Signed by Judge Henry H. Kennedy, Jr., on September 7, 2006. Associated Cases: 1:01-cv-02674-HHK,1:03-cv-00691-HHK,1:03-cv-00888-HHK(FL,) (Entered: 09/07/2006)
09/07/2006	36	Judgment. Signed by Judge Henry H. Kennedy, Jr., on September 7, 2006. (FL,) (Entered: 09/07/2006)

10/05/2006	37	NOTICE OF APPEAL by CARRIE SEYAM, NABIL SEYAM, AHMAD SEYAM, YUSEF SEYAM, MELISSA SEYAM. Filing fee $ 455, receipt number 1021396. Fee Status: Fee Paid. Parties have been notified. (Cavanaugh, Anthony) (Entered: 10/05/2006)
* * * * *		
10/17/2006		USCA Case Number 06-7178 for 37 Notice of Appeal filed by NABIL SEYAM, AHMAD SEYAM,, YUSEF SEYAM,, MELISSA SEYAM, CARRIE SEYAM,. (lc,) (Entered: 10/18/2006)
12/13/2006	38	ORDER of USCA (certified copy) as to 58 Notice of Appeal filed by REPUBLIC OF IRAQ; It is hereby ordered that the motion be granted and this case is hereby dismissed; USCA#06-7177 (jsc) (Entered: 01/23/2007)

APPENDIX G

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:01-cv-02674-HHK

VINE, et al v. REPUBLIC OF IRAQ, et al
Assigned to: Judge Henry H. Kennedy
Demand: $5,000,000,000
Member case: (View Member Case)
Case in other court: USCA-DC, 06-07177
Cause: 28:1602 Foreign Sovereign Immunities Act

Date Filed: 12/27/2001
Jury Demand: None
Nature of Suit: 360 P.I.: Other
Jurisdiction: Federal Question

* * * * *

Date Filed	#	Docket Text
* * * * *		
08/29/2003	24	STATEMENT filed UNITED STATES , regarding: lack of subject matter jurisdiction.; exhibits (3); "LEAVE TO FILE GRANTED" by Judge Kennedy. (bcs) (Entered: 09/03/2003)

09/02/2003	25	RESPONSE by plaintiffs to statement of interest of the United States regarding lack of subject matter jurisdiction [24-1] (bcs) (Entered: 09/04/2003)
* * * * *		
09/22/2003	26	RESPONSE by plaintiffs to statement of interest of the United States regarding lack of subject matter jurisdiction [24-1]; exhibit (1) (bcs) (Entered: 09/23/2003)
10/02/2003	27	REPLY by UNITED STATES in support of its statement of interest regarding lack of subject matter jurisdiction [24-1].; exhibit (1) (bcs) (Entered: 10/03/2003)
* * * * *		
07/20/2004	30	Memorandum and Order. Signed by Judge Henry H. Kennedy, Jr., on July 20, 2004. (FL,) (Entered: 07/20/2004)
* * * * *		
02/25/2005	42	THIRD AMENDED COMPLAINT against REPUBLIC OF IRAQ, SADDAM HUSSEIN filed by ROBERT FREDERICK CAMERON, DERIN CAMERON, JOSEPH

		MARLEE CAMERON, SARAH NILE CAMERON, JOHN O'NEIL GERALD, JOHN THOMAS GORDON, ELMILOUDI HAMID, ROBIN HAMID, CHARLES HODDE, ORMON M. KEATHLEY, JAMES S. VINE, CHARLES P. KEEGAN, J. CRAWFORD KERR, THOMAS LITRENTA, G. SCOTT MINDRUM, ANTHONY MIRELES, ELEANOR MIRELES, MARIA MIRELES, MIRIAM PRABHAKAR, EMMANUEL PRABHAKAR, JOSHUA PRABHAKAR, DONNA VINE, STEPHEN PRABHAKAR, OSAMA SHOUFI, JONI SHOUFI, EMIL SKODEN, DOROTHEA SKODEN, CATHERINE SKODEN, FELIPE ALAYON, CONCEPCION ALAYON, MICHAEL ANTONELLI, JOHN ALEXANDER, ALFRED E. ALLEN, KERRY E.N. ALLEN, SHAWN K.N. ALLEN, FRANCIA MANCERA ANDRE, GERALD W. ANDRE, KEITH SHANE BODIFORD, HEIDI BRILL-EDWARDS, BETTY JEAN BRYANT, MICHAEL CAPPS, MAE ANTONELLI, JAMES E. CARROLL,

		SHIRLEY R. CARROLL, ALL PLAINTIFFS, ALLEN ANTONELLI, TANIA ANTONELLI, MICHAEL C. BENDER, MARY A. BENDER, TIMOTHY P. BENDER.(lc,) (Entered: 02/28/2005)
		* * * * *
03/07/2005	44	MOTION to Dismiss by REPUBLIC OF IRAQ. (Attachments: # 1 Exhibit 1 (Original Complaint in Hill v. Republic of Iraq)# 2 Exhibit 2 (First Amended Complaint in Hill v. Republic of Iraq))(Martin, Lawrence) (Entered: 03/07/2005)
		* * * * *
03/22/2005	46	Memorandum in opposition to motion re 44 *Plaintiff's Memorandum In Opposition To Defendant's Motion To Dismiss* filed by ALL PLAINTIFFS. (Attachments: # 1 Tab A# 2 Tab B# 3 Tab C)(Wolf, Daniel) (Entered: 03/22/2005)
03/22/2005	47	MOTION to Consolidate Cases *Seyam v. Republic Of Iraq And Simon v. Republic Of Iraq With This Action* by ALL PLAINTIFFS. (Attachments: # 1 Text of Proposed Order)(Wolf,

		Daniel) (Entered: 03/22/2005)
* * * * *		
05/06/2005		MINUTE ORDER granting 47 MOTION to Consolidate Cases Seyam v. Republic Of Iraq And Simon v. Republic Of Iraq With This Action for purpose of deciding pending motions to dismiss. (Kennedy, Henry) (Entered: 05/06/2005)
05/06/2005		Cases associated. (lc,) (Entered: 05/23/2005)
* * * * *		
06/10/2005	53	REPLY to opposition to motion re 44 *Motion to Dismiss* filed by REPUBLIC OF IRAQ. Associated Cases: 1:01-cv-02674-HHK,1:03-cv-00691-HHK,1:03-cv-00888-HHK(Martin, Lawrence) (Entered: 06/10/2005)
06/17/2005	54	MOTION for Leave to File *Sur-Reply in Further Opposition to Iraq's Motion to Dismiss Plaintiffs' Third Amended Complaint* by ROBERT FREDERICK CAMERON, DERIN CAMERON, JOSEPH MARLEE CAMERON, SARAH NILE CAMERON, JOHN O'NEIL GERALD, JOHN

		THOMAS GORDON, ELMILOUDI HAMID, ROBIN HAMID, CHARLES HODDE, ORMON M. KEATHLEY, JAMES S. VINE, CHARLES P. KEEGAN, J. CRAWFORD KERR, THOMAS LITRENTA, G. SCOTT MINDRUM, ANTHONY MIRELES, ELEANOR MIRELES, MARIA MIRELES, MIRIAM PRABHAKAR, EMMANUEL PRABHAKAR, JOSHUA PRABHAKAR, DONNA VINE, STEPHEN PRABHAKAR, OSAMA SHOUFI, JONI SHOUFI, EMIL SKODEN, DOROTHEA SKODEN, CATHERINE SKODEN, FELIPE ALAYON, CONCEPCION ALAYON, MICHAEL ANTONELLI, JOHN ALEXANDER, ALFRED E. ALLEN, KERRY E.N. ALLEN, SHAWN K.N. ALLEN, FRANCIA MANCERA ANDRE, GERALD W. ANDRE, KEITH SHANE BODIFORD, HEIDI BRILL-EDWARDS, BETTY JEAN BRYANT, MICHAEL CAPPS, MAE ANTONELLI, JAMES E. CARROLL, SHIRLEY R. CARROLL, ALL PLAINTIFFS, ALLEN ANTONELLI, TANIA

		ANTONELLI, MICHAEL C. BENDER, MARY A. BENDER, TIMOTHY P. BENDER. (Attachments: # 1 Proposed Order# 2 Plaintiffs' Sur-Reply in Further Opposition to Iraq's Motion to Dismiss Plaintiffs' Third Amended Complaint# 3 Certificate of Service)Associated Cases: 1:01-cv-02674-HHK,1:03-cv-00691-HHK,1:03-cv-00888-HHK(Wolf, Daniel) (Entered: 06/17/2005)
06/20/2005		Minute order granting 54 plaintiffs' unopposed motion for leave to file sur-reply in further opposition to Iraq's motion to dismiss plaintiffs' third amended complaint. Plaintiffs' sur-reply in further opposition to Iraq's motion to dismiss is deemed filed. Signed by Judge Henry H. Kennedy, Jr., on June 20, 2005. Official paperless order Associated Cases: 1:01-cv-02674-HHK,1:03-cv-00691-HHK,1:03-cv-00888-HHK(FL,) (Entered: 06/20/2005)
06/20/2005	55	SURREPLY to re 44 MOTION to Dismiss filed by ALL PLAINTIFFS. Associated Cases: 1:01-cv-02674-HHK,1:03-cv-00691-HHK,1:03-cv-00888-HHK(lc,) (Entered:

		06/21/2005)
09/07/2006	56	Memorandum Opinion and Order. Signed by Judge Henry H. Kennedy, Jr., on September 7, 2006. Associated Cases: 1:01-cv-02674-HHK,1:03-cv-00691-HHK,1:03-cv-00888-HHK(FL,) (Entered: 09/07/2006)
* * * * *		
10/06/2006	58	NOTICE OF APPEAL as to 30 Memorandum & Opinion, 56 Memorandum & Opinion by REPUBLIC OF IRAQ. Filing fee $ 455, receipt number 139152. Fee Status: Fee Paid. Parties have been notified. (lc,) (Entered: 10/10/2006)
* * * * *		
12/13/2006	63	ORDER of USCA (certified copy) as to 58 Notice of Appeal filed by REPUBLIC OF IRAQ; It is hereby ordered that the motion be granted and this case is hereby dismissed; USCA#06-7177 (jsc) (Entered: 01/23/2007)
* * * * *		

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JORDAN BEATY, AUSTIN MAKENZIE BEATY, a minor by her next friend ROBIN BEATY, 5500 Stonegate Lane, Mustang, Oklahoma 73064 WILLIAM R. BARLOON, 3633 Van Buren, Virginia Beach, Virginia 23452 BRYAN C. BARLOON and REBECCA L. BARLOON, a minor by her next friend, LINDA BARLOON, 2250 Spanish Moss, Jacksonville, Florida 32246 Plaintiffs vs. REPUBLIC OF IRAQ Defendant	FILED FEB 10 2003 CASE NUMBER 1:03CV00215 JUDGE: John D. Bates DECK TYPE: Personal Injury/Malpractice DATE STAMP: 02/10/2003

PLAINTIFFS' COMPLAINT

COME NOW THE PLAINTIFFS, and each of them, and for cause of action against Defendant

REPUBLIC OF IRAQ, complain and allege as follows:

JURISDICTION

1. Jurisdiction arises pursuant to 28 U.S.C. Section 1605 (a)(7), as amended. Plaintiffs have previously offered to arbitrate pursuant to international rules of arbitration pursuant to 28 U.S.C. 1605(a)(7). A copy of such Offer to Arbitrate is attached hereto and filed contemporaneously. This Court has subject matter and personal jurisdiction over Defendant.

PARTIES

2. Plaintiffs Jordan Beaty and Austin Makensie Beaty are the daughters of Kenneth Beaty and Robin Beaty, plaintiffs and judgment creditors in David Daliberti v. Republic of Iraq, Cause No. 96CV01118, reduced to judgment at 146 F.Supp.2d 19 (D.C.D 2001), (hereinafter the "***Daliberti*** case"). Plaintiffs William R. Barloon, Bryan C. Barloon and Rebecca L. Barloon are the children of William Barloon and Linda Barloon are plaintiffs and judgment creditors in David Daliberti v. Republic of Iraq, Cause No. 96CV01118, the ***Daliberti*** case. Plaintiffs Jordan Beaty and Austin Makensie Beaty are residents of the State of Oklahoma. Plaintiffs William R. Barloon, Bryan C. Barloon and Rebecca L. Barloon are residents of the State of Florida. All Plaintiffs are citizens of the United States.

3. Defendant Republic of Iraq is a foreign sovereign whose activities herein were outside the scope of immunity provided by the Foreign Sovereign Immunities Act. Defendant Republic of Iraq is a designated terrorist nation as that term is defined in the Foreign Sovereign Immunities Act as amended.

* * * * *

WHEREFORE, Plaintiffs, and each of them as specified herein, respectfully request the following relief:

1. General, specific and compensatory damages in the amount of $565,800.00 to Jordan Beaty;

2. General, specific and compensatory damages in the amount of $565,800.00 to Robin Beaty as next friend for Austin Makensie Beaty;

3. General, specific and compensatory damages in the amount of $347,760 to William R. Barloon;

4. General, specific and compensatory damages in the amount of $347,760 to Bryan C. Barloon;

5. General, specific and compensatory damages in the amount of $347,760 to Linda Barloon as next friend for Rebecca Barloon;

6. Costs of this suit; and

7. Any further relief which the Court deems just and proper.

Respectfully submitted,

Andrew C. Hall
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Brickel
Miami, Florida 33131
(305) 374-5030
(305) 374-5033 – Fax

Nelson M. Jones, III
D.C. Bar # 320266
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(361) 729-3566
(361) 729-7120

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT SIMON 34B Ha'kivma Street Herzylia Pituah, Israel, FRANÇOISE SIMON 34B Ha'kivma Street Herzylia Pituah, Israel, ROBERTO ALVAREZ 2634 SW 4th Avenue Miami, FL 33129, ROBERT ALVAREZ c/o Roberto Alvarez 2634 SW 4th Avenue Miami, FL 33129 Plaintiffs, v. THE REPUBLIC OF IRAQ c/o Ministry of Foreign Affairs Baghdad, Republic of Iraq, THE IRAQI INTELLIGENCE SERVICE c/o Ministry of Foreign Affairs, Baghdad, Republic of Iraq, and SADDAM HUSSEIN in his official capacity as PRESIDENT OF THE REPUBLIC OF IRAQ c/o Ministry of Foreign Affairs Baghdad, Republic of Iraq, Defendants.	FILED MAR 18 2003 CASE NUMBER: 1:03CV00691 JUDGE: James Robertson DECK TYPE: General Civil DATE STAMP: 03/18/2003 **COMPLAINT**

COMPLAINT FOR DAMAGES

Plaintiffs, Americans taken hostage and tortured by the Republic of Iraq during the Gulf War, and their principally affected family members, bring this action against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein, in his official capacity as President of Iraq. This action is for the personal injury caused to the plaintiffs as a result of being seized, held hostage, and tortured while held by Iraq in Kuwait and Iraq, and for the personal injury to their family members caused by these acts against their loved ones. Plaintiffs seek redress for personal injury, emotional distress, economic damages, pain and suffering, and solatium, and punitive damages to prevent future hostage taking and torture of Americans. Plaintiffs, as and for their Complaint, allege as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over all matters in this action with respect to 28 U.S.C. § 1330 as a claim for relief with respect to a foreign state not entitled to immunity under §§ 1605-1607 of that title, including particularly 28 U.S.C. § 1605(a)(7) of the Foreign Sovereign Immunities Act of 1976, *as amended*, ("FSIA"), which provides a general exception from immunity of a foreign state for any case in which money damages are sought for personal injury caused by an act of torture, hostage taking, or the provision of material support or resources for such act by an official, employee, or agent of a state designated as a state sponsor of terrorism at the time the illegal acts occurred. Relevant to this provision, the Republic of Iraq was designated as a state sponsor of terrorism by the Department of State on September 13, 1990,

following its invasion of Kuwait, prior to its hostage taking and torture of these Americans by Iraqi military and intelligence officials under the direct guidance and control of Saddam Hussein, during the Persian Gulf War. The Republic of Iraq was so designated throughout the period in which the acts complained of in this Complaint occurred, and it remains so designated.

2. Further, all claimants in this action are nationals of the United States, and the Defendants in this action have been afforded a reasonable opportunity to arbitrate the claims detailed herein for acts occurring in the Republic of Iraq in accordance with accepted international rules of arbitration. A copy of correspondence affording Defendants this opportunity is attached hereto at Tab A. A further offer to enter into such arbitration concerning the claims herein for acts occurring in the Republic of Iraq in lieu of prosecution of the claims in this action has been filed with the Complaint and is attached hereto at Tab B.

3. This action, brought pursuant to 28 U.S.C. §§ 1330 & 1602-11 of the FSIA, is filed within the limitation period for actions under 28 U.S.C. § 1605(a)(7), as set out in § 1605(f). The Government of the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein in his official capacity as President of the Republic of Iraq, were immune from suit in this action prior to the 1996 Amendments to the FSIA by the Anti-Terrorism and Effective Death Penalty Act of 1996, P.L. 104-132, 110 Stat. 1214, 1241 (1996), which added § 1605(a)(7) to the FSIA. As such, the limitation period is tolled until effective enactment of these amendments on April 24, 1996, and the ten-year limitation period begins in that

month and year and runs until April 2006. Further, the 1996 Amendments adding § 1605(a)(7) were specifically made retroactively applicable by Congress to "any cause of action arising before, on, or after the date of the enactment of this Act." *See* P.L. 104-132, § 221(c), 110 Stat. 1243 (April 24, 1996), *reprinted at* 28 U.S.C.A. § 1605 note.

4. Venue is properly in this district pursuant to 28 U.S.C. § 1391(f)(4) because Defendants are "foreign states" as defined by 28 U.S.C. § 1603(a) & (b). Defendant the Republic of Iraq is a foreign state and, as such, is a "foreign state" as defined by 28 U.S.C. § 1603(a). Defendants the Iraqi Intelligence Service and Saddam Hussein, in his official capacity as President of the Republic of Iraq, are "agencies or instrumentalities of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such, are also "foreign states" within the meaning of 28 U.S.C. § 1603(a).

* * * * *

PLAINTIFFS

13. Plaintiff Robert Simon is a United States citizen, who resides in Herzylia Pituah, Israel. He was taken hostage by Iraq on January 21, 1991, and continued to be held hostage by Iraq until his release on March 2, 1991.

14. Plaintiff Françoise Simon is a United States citizen, who resides in Herzylia Pituah, Israel. She is the spouse of Robert Simon, and was his spouse throughout his period of captivity.

15. Plaintiff Roberto Alvarez is a United States citizen, and a resident of the State of Florida. He was taken hostage by Iraq on January 21, 1991, and continued to be held hostage by Iraq until his release on March 2, 1991.

16. Plaintiff Robert Alvarez is a United States citizen, and a resident of the State of Florida. He is the adult son of Roberto Alvarez.

DEFENDANTS

17. Defendant the Republic of Iraq is a "foreign state" as defined by 28 U.S.C. § 1603, whose activities of torture and resulting tortious personal injury of American hostages and their families as set forth in this Complaint are within the exceptions to jurisdictional immunity of a foreign state pursuant to the FSIA. Its officials, employees, and agents carried out the torture and related mistreatment of the American hostages under the direction of Saddam Hussein while acting within the scope of their office, employment, or agency. Irrespective of individual and institutional responsibilities that also exist, the Republic of Iraq is responsible for the hostage taking, torture, and related harm to the American hostages and their family members.

18. Defendant the Iraqi Intelligence Service is an "agency or instrumentality of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such, is a "foreign state" within the meaning of § 1603. The Service and its officials and employees are officials, employees, or agents of the Republic of Iraq who participated in and provided material support and resources to the acts of hostage taking, torture, and related harm to the American hostages and their family members.

19. Defendant Saddam Hussein, President of Iraq, is an "official" of Iraq within the meaning of § 1605(a)(7). Similarly, for purposes of § 1605(a)(7), he is also an "agency or instrumentality of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such,

is a "foreign state" within the meaning of § 1603. Saddam Hussein is the President, and dictator, of a single-party totalitarian state and is simultaneously the Head of the State, the Chair of the Governing Council, the Chairman of the Party, the exclusive appointing authority for all government offices, the director of the budget, the Commander-in-Chief of the Military, and at least the de facto head of the Intelligence Service and all other agencies and instrumentalities of Iraq. As President of Iraq during the relevant time period of hostage taking, torture, and related harm to the American hostages and their family members, Defendant Saddam Hussein is responsible for these injuries while acting within the scope of his office. He is sued in his official capacity as President of Iraq, an office he continues to hold at the time filing of this Complaint. In that office, he had both direct command responsibility for the torture and related mistreatment of American hostages taken in Kuwait and Iraq, and responsibility for provision of material support to such acts by Iraqi forces. Further, all of the assets of Iraq are ultimately subject to the direction and control of Defendant Saddam Hussein.

* * * * *

RELIEF REQUESTED

53. **WHEREFORE**, Plaintiffs, as determined by their individual facts as specified herein, and in recognition of the depraved and outrageous conduct of the Defendants, respectfully request the following relief to be entered against all Defendants, The Republic of Iraq, the Iraqi Intelligence Service, and President Saddam Hussein, in his official capacity as President of the Republic of Iraq, jointly and severally:

(a) General and specific compensatory damages (including pain and suffering) in excess of Fifteen Million Dollars ($15,000,000.00) as to each Plaintiff Robert Simon and Roberto Alvarez;

(b) General and specific compensatory damages (including solatium) in excess of Three Million Dollars ($3,000,000.00) as to each Plaintiff Françoise Simon and Robert Alvarez;

(c) Costs of this suit;

(d) Reasonable attorneys' fees; and

(e) Such further relief as the Court may deem just and proper.

54. **PLAINTIFFS FURTHER RESPECTFULLY REQUEST** the following additional relief to be entered against Defendants, the Iraqi Intelligence Service, and President Saddam Hussein in his official capacity as President of the Republic of Iraq, jointly and severally:

(a) Punitive damages in excess of One Hundred Million Dollars ($100,000,000.00), to be shared equally between all Plaintiffs; and

(b) Such further relief as the Court may deem just and proper.

Respectfully submitted,
Stephen A. Fennell
D.C. Bar # 290379
1330 Connecticut Avenue N.W.
Washington, D.C. 20046-1795
(202) 429-8082
(202) 429-3902 – fax

Attorney for the Plaintiffs

Dated March 18, 2003

APPENDIX J

UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NABIL SEYAM
9405 East Lakepoint
Wichita, KS 67226,
AHMAD SEYAM
9405 East Lakepoint
Wichita, KS 67226,
YUSEF SEYAM
9405 East Lakepoint
Wichita, KS 67226,
MELISSA SEYAM
2357 N. Rutland Court
Wichita, KS 67226,
CARRIE SEYAM
7650 East 32nd Street North, Apt. 307 Wichita, KS 67226
Plaintiffs, v.
THE REPUBLIC OF IRAQ
c/o Ministry of Foreign Affairs
Baghdad, Republic of Iraq
THE IRAQI INTELLIGENCE SERVICE c/o Ministry of Foreign Affairs Baghdad, Republic of Iraq, and SADDAM HUSSEIN in his official capacity as PRESIDENT OF THE REPUBLIC OF IRAQ c/o Ministry of Foreign Affairs Baghdad, Republic of Iraq,
Defendants.

FILED
APR 14 2003

COMPLAINT

CASE NUMBER 1:03CV00888
JUDGE: Reggie B. Walton
DECK TYPE: General Civil
DATE STAMP: 4/15/2003

COMPLAINT FOR DAMAGES

Plaintiff, Nabil Seyam, an American taken hostage by the Republic of Iraq just before the first Gulf War, and some of his family members bring this action against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein, in his official capacity as President of Iraq. This action is for the personal injury caused to the plaintiffs as a result of being seized, held hostage and tortured while held by Iraq in Kuwait and Iraq, and for the personal injury to Seyam's family members caused by these acts. Plaintiffs seek redress for personal injury, emotional distress, economic damages, pain and suffering, and solatium, and punitive damages to prevent future hostage taking and torture of Americans. Plaintiffs, as and for their Complaint, allege as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over all matters in this action with respect to 28 U.S.C. § 1330 as a claim for relief with respect to a foreign state not entitled to immunity under §§ 1605-1607 of that title, including particularly 28 U.S.C. § 1605(a)(7) of the Foreign Sovereign Immunities Act of 1976, as amended, ("FSIA"), which provides a general exception from immunity of a foreign state for any case in which money damages are sought for personal injury caused by an act of torture, hostage taking, or the provision of material support or resources for such acts by an official, employee, or agent of a state designated as a state sponsor of terrorism at the time the illegal acts occurred. Relevant to this provision, the Republic of Iraq was designated as a state sponsor of terrorism by the Department of State on September 13, 1990, following its invasion of Kuwait, prior to its hostage

taking and torture of Seyam by Iraqi military and intelligence officials under the direct guidance and control of Saddam Hussein. The Republic of Iraq was so designated throughout the period in which the acts complained of in this Complaint occurred and it remains so designated.

2. Further, all claimants in this action are nationals of the United States, and the Defendants in this action have been afforded a reasonable opportunity to arbitrate the claims detailed herein for acts occurring in the Republic of Iraq in accordance with accepted international rules of arbitration. A copy of correspondence affording Defendants this opportunity is attached hereto at Tab A. An offer to enter into arbitration for claims for acts occurring in the Republic of Iraq in accordance with accepted international rules of arbitration has been filed with this Complaint and is attached hereto at Tab B.

3. This action, brought pursuant to 28 U.S.C. §§ 1330 & 1602-11 of the FSIA, is filed within the limitation period for actions under 28 U.S.C. § 1605(a)(7), as set out in § 1605(f). The Government of the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein, in his official capacity as the President of the Republic of Iraq, were immune from suit in this action prior to the 1996 Amendments to the FSIA by the Anti-Terrorism and Effective Death Penalty Act of 1996, P.L. 104-132, 110 Stat. 1214, 1241 (1996), which added § 1605(a)(7) to the FSIA. As such, the limitation period is tolled until effective enactment of these amendments on April 24, 1996, and the ten-year limitation period begins in that month and year and runs until April 2006. Further, the 1996 Amendments added § 1605(a)(7) were

specifically made retroactively applicable by Congress to "any cause of action arising before, on, or after the date of the enactment of this Act." *See* P.L. 104-132, § 221(c), 110 Stat. 1243 (April 24, 1996), *reprinted at* 28 U.S.C.A. § 1605 note.

4. Venue is properly in this district pursuant to 28 U.S.C. § 1391(f)(4) because Defendants are "foreign states" as defined by 28 U.S.C. § 1603(a) and (b). Defendant the Republic of Iraq is a foreign state and, as such, is a "foreign state" as defined by 28 U.S.C. § 1603(a). Defendants the Iraqi Intelligence Service and Saddam Hussein, in his official capacity as President of the Republic of Iraq, are "agencies or instrumentalities of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such, are also "foreign states" within the meaning of 28 U.S.C. § 1603(a).

* * * * *

PLAINTIFFS

13. Plaintiff Nabil Seyam is a United States citizen, who resides in Wichita, Kansas. He was taken hostage by Iraq on October 1, 1990, and continued to be held hostage by Iraq until his release on October 19, 1990.

14. Plaintiff Melissa Seyam is a United States citizen, and a resident of the State of Kansas. She is the daughter of Nabil Seyam.

15. Plaintiff Ahmad Seyam is a United States citizen, and a resident of the State of Kansas. He is the son of Nabil Seyam.

16. Plaintiff Yusef Seyam is a United States citizen, and a resident of the State of Kansas. He is the son of Nabil Seyam.

17. Plaintiff Carrie Seyam is a United States citizen, and a resident of the State of Kansas. She is the former spouse of Nabil Seyam.

DEFENDANTS

18. Defendant the Republic of Iraq is a "foreign state" as defined by 28 U.S.C. § 1603, whose activities of torture and resulting tortious personal injury of American hostages and their families as set forth in this Complaint are within the exceptions to jurisdictional immunity of a foreign state pursuant to the FSIA. Its officials, employees, and agents carried out the torture and related mistreatment of Nabil Seyam under the direction of Saddam Hussein while acting with the scope of their office, employment, or agency. Irrespective of individual and institutional responsibilities that also exist, the Republic of Iraq is responsible for the hostage taking, torture, and related harm to Seyam and his family members.

19. Defendant the Iraqi Intelligence Service is an "agency or instrumentality of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such, is a "foreign state" within the meaning of § 1603. The Service and its officials and employees are officials, employees, or agents of the Republic of Iraq who participated in and provided material support and resources to the acts of hostage taking, torture, and related harm to Seyam and his family members.

20. Defendant Saddam Hussein, President of Iraq, is an "official" of Iraq within the meaning of § 1605(a)(7). Similarly, for purposes of § 1605(a)(7), he is also an "agency or instrumentality of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such, is a "foreign state" within the meaning of § 1603. Saddam Hussein is the President, and dictator, of a

single-party totalitarian state and is simultaneously the Head of the State, the Chair of the Governing Council, the Chairman of the Party, the exclusive appointing authority for all government offices, the director of the budget, the Commander-in-Chief of the Military, and at least the de facto head of the Intelligence Service and all other agencies and instrumentalities of Iraq. As President of Iraq during the relevant time period of hostage taking, torture, and related harm to Seyam and his family members, Defendant Saddam Hussein is responsible for these injuries while acting within the scope of his office. He is sued in his official capacity as President of Iraq. In that office, he has both direct command responsibility for the torture and related mistreatment of American hostages taken in Kuwait and Iraq, and responsibility for provision of material support to such acts by Iraqi forces. Further, all of the assets of Iraq are ultimately subject to the direction and control of Defendant Saddam Hussein.

* * * * *

RELIEF REQUESTED

52. **WHEREFORE**, Plaintiffs, as determined by their individual facts as specified herein, and in recognition of the depraved and outrageous conduct of Defendants, respectfully request the following relief to be entered against all Defendants, The Republic of Iraq, the Iraqi Intelligence Service, and President Saddam Hussein, in his official capacity as President of the Republic of Iraq, jointly and severally:

(a) General and specific compensatory damages (including pain and suffering) in excess of Three Million Dollars ($3,000,000.00) as to Plaintiff Nabil Seyam;

(b) General and specific compensatory damages (including solatium) in excess of One Million Dollars ($1,000,000.00) as to each Plaintiff Ahmad Siam, Amenha Seyam, Ahmad Seyam, Anisa Seyam, Melissa Seyam, Yusef Seyam, and Carrie Seyam;

(c) Costs of this suit;

(d) Reasonable attorneys' fees; and

(e) Such further relief as the Court may deem just and proper.

53. **PLAINTIFFS FURTHER RESPECTFULLY REQUEST** the following additional relief to be entered against Defendants, the Iraqi Intelligence Service, and President Saddam Hussein in his official capacity as President of the Republic of Iraq, jointly and severally:

(a) Punitive damages in excess of One Hundred Million Dollars ($100,000,000.00), to be shared equally between all Plaintiffs; and

(b) Such further relief as the Court may deem just and proper.

Respectfully submitted,

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Attorneys for the Plaintiffs

Dated April 15, 2003

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ROBIN BEATY, *et al.*,	
Plaintiffs,	
v.	Civil Action No.
REPUBLIC OF IRAQ,	03-0215 (JDB)
Defendant.	

STATEMENT OF INTEREST OF THE UNITED STATES

* * * * *

INTRODUCTION

On January 29, 2004, the Court invited the United States to file a Statement of Interest to address "this Court's jurisdiction in light of the issuance of Presidential Determination No. 2003-23, and in light of the recent issuance of the opinion in *Cicippio-Puleo v. Islamic Republic of Iran* . . . by the D.C. Circuit Court of Appeals." Order at 1. Because Presidential Determination No. 2003-23 rendered the sole jurisdictional basis for this suit—Section 1605(a)(7) of the Foreign Sovereign Immunities Act ("FSIA")—inapplicable to Iraq, the United States hereby submits this Statement of Interest and

respectfully requests that the Court dismiss this action for lack of subject-matter jurisdiction.

As United States-led military operations in Iraq progressed last year, Congress and the President took certain steps to accomplish the critical policy goals of stabilizing and reconstructing Iraq as quickly as possible. Following the overthrow of Saddam Hussein, Congress granted the President statutory power to render inapplicable federal laws that otherwise applied to Iraq by virtue of its designation as a terrorist state, and the President promptly exercised that authority. These actions by Congress and the President made inapplicable to Iraq 28 U.S.C. § 1605(a)(7), which previously had lifted Iraq's sovereign immunity from suit. Once this provision was made inapplicable, the Court was divested of subject-matter jurisdiction in this action. *See* 28 U.S.C. § 1330 (providing district courts with jurisdiction over civil actions against foreign states, but only where "the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement").

The United States Government is sympathetic to plaintiffs' claims in this case. Nevertheless, the political branches of the Government decided, after the oppressive regime of Saddam Hussein was removed from power, that provisions of law that had previously applied to Iraq only because of its support for terrorism must no longer apply. Among those provisions is Section 1605(a)(7), which lifted Iraq's immunity from suit in U.S. courts for certain terrorism-related claims. In setting aside Section 1605(a)(7), the President restored to a liberated Iraq

a sovereign immunity afforded by United States law to virtually every other foreign country.

Because this case must be dismissed for lack of subject-matter jurisdiction, the Court need not decide the effect on this suit of the D.C. Circuit's recent decision in *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004). If the Court finds it necessary to reach that question, however, the holding of *Cicippio-Puleo* is clear: neither Section 1605(a)(7) of the FSIA nor the so-called Flatow Amendment, reprinted at 28 U.S.C. § 1605 Note, creates a private cause of action against a foreign state. Therefore, even if the Court had not been divested of subject-matter jurisdiction, this action could not proceed as currently pled because plaintiffs' complaint appears to rely solely on Section 1605(a)(7) for a cause of action against Iraq.

The United States' appearance in this case, pursuant to the Court's invitation and 28 U.S.C. § 517, is occasioned by: (1) its own significant foreign policy interest in restoring sovereign immunity to a liberated Iraq to remove the burdens created by Saddam Hussein's regime and to speed the rebuilding of that country; (2) its "undeniable interest in the enforcement of its laws," *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 155 (D.D.C. 2002), *aff'd*, 333 F.3d 228 (D.C. Cir. 2003), including Section 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003 and Presidential Determination No. 2003-23, *see Roeder*, 195 F. Supp. 2d at 155 (recognizing the United States' "cognizable" interest in the enforcement of an Executive Order and its implementing regulations, which prohibited lawsuits arising out of the Iranian hostage crisis); and (3) its substantial foreign policy

interest in ensuring that Section 1605(a)(7) and the Flatow Amendment are applied correctly and thereby not construed to create federal causes of actions against foreign states.

BACKGROUND

In 1976, Congress enacted the Foreign Sovereign Immunities Act ("FSIA") (Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602-1611)), to codify both the sovereign immunity of foreign States and the exceptions to such immunity. 28 U.S.C. § 1602; *see Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 496-97 (1983). The FSIA provides that, as a general matter, foreign states are immune from the jurisdiction of the courts of the United States. 28 U.S.C. § 1604. The statute also identifies specific exceptions to immunity, *id.* at § 1605, largely codifying the "restrictive theory" of immunity that had governed State Department determinations of foreign sovereign immunity between 1952 and the enactment of the FSIA.[1] *See Joo v. Japan*, 332 F.3d 679, 682 (D.C. Cir. 2003). Thus, for example, the FSIA recognizes a foreign state's amenability to suit if that entity waives its immunity, or if the suit involves certain types of commercial activity. *Id.* at § 1605(a)(1), (2). The FSIA also grants United States district courts jurisdiction over cases in which "the foreign state is not entitled to immunity either under sections 1605-1607 of this

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[1] Prior to 1952, federal courts generally followed the doctrine of "absolute immunity," as requested by the State Department. *See Verlinden*, 461 U.S. at 486; Joo, 332 F.3d at 682. In 1952, the State Department announced its adoption of the "restrictive theory" of sovereign immunity in the so-called Tate Letter. *See Verlinden*, 461 U.S. at 487.

title or under any applicable international agreement." *Id.* at § 1330.

In 1996, after the Iraqi conduct at issue in this case, Congress amended the FSIA, adding a further exception to the immunity of foreign states with respect to certain state-sponsored terrorist conduct. *See* Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No. 104- 132, § 221, 110 Stat. 1214, 1241-1243). That amendment abrogates a foreign state's immunity from suit for a claim for personal injury or death caused by hostage taking, among other things, if the act was engaged in "by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency." 28 U.S.C. § 1605(a)(7). For a suit to come within this exception to immunity, the Secretary of State must have designated the foreign country as a state sponsor of terrorism.[2] *Id.* at § 1605(a)(7)(A). Moreover, if the act giving rise to the suit occurred in the defendant foreign state, the putative plaintiff must have given the state the opportunity to arbitrate the claim. *Id.* at § 1605(a)(7)(B)(i). And either the claimant or the victim must have been a United States national at the time the underlying conduct occurred. Surveying these various restrictions, the D.C. Circuit has described Section 1605(a)(7) as a "delicate legislative compromise" to address the sensitive foreign policy concerns caused by rogue terrorist states. *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 329 (D.C. Cir. 2003) (quoting *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 88-89 (D.C. Cir. 2002)); *see also*

[2] Iraq was designated by the Secretary of State as a state sponsor of terrorism in 1990. *See* 55 Fed. Reg. 37793 (Sept. 13, 1990).

Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38, 50 (D.D.C. 2000); Molora Vadnais, *The Terrorism Exception to the Foreign Sovereign Immunities Act*, 5 UCLA J. Int'l L. & For. Aff. 199, 216 (2000). In this regard, Section 1605(a)(7) thus differs markedly from the other, generally applicable exceptions to foreign sovereign immunity enumerated in Section 1605(a).

On February 10, 2003, plaintiffs filed suit against the Republic of Iraq, seeking damages for the loss of solatium that they suffered when their fathers, Kenneth Beaty and William Barloon, were temporarily taken hostage by the Republic of Iraq in 1993 and 1995, respectively.

The complaint identifies 28 U.S.C. § 1605(a)(7) as the source of the Court's jurisdiction and appears to rely on the same provision for a substantive cause of action against Iraq. On October 22, 2003, the Clerk of Court, at plaintiffs' request, sent the summons and complaint by Federal Express to the "Interim Government, Republic of Iraq, Foreign Affairs Minister, Baghdad, Iraq." Proof of Service of Summons & Complaint, Exhibit 1. According to plaintiffs, the package was delivered to Baghdad on October 26 and signed for by "A. Fatah."[3] *Id.*

In April 2003, however, as part of legislation providing funds for activities in Iraq, Congress authorized the President to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 *or any other provision of law*

[3] The United States does not herein address the effectiveness of plaintiffs' purported service. It should be noted, however, that there may be serious questions as to whether service in this case was in compliance with 28 U.S.C. § 1608, and the United States reserves the right to address that issue at a later date, if necessary.

that applies to countries that have supported terrorism." Emergency Wartime Supplemental Appropriations Act of 2003 ("EWSAA"), Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579 (emphasis added) (attached hereto at Tab 1). On May 7, 2003, President Bush implemented the statutory authority conferred by Section 1503 of the EWSAA by issuing Presidential Determination No. 2003-23. This determination expressly made inapplicable to Iraq "section 620A of the Foreign Assistance Act of 1961, Public Law 87-195, as amended (the 'FAA'), and any other provision of law that applies to countries that have supported terrorism." Presidential Determination No. 2003-23, 68 Fed. Reg. 26459 (May 16, 2003) (attached hereto at Tab 2). In a message to Congress of May 22, 2003, the President explained that the provisions of law made inapplicable to Iraq by the Determination "include, but are not limited to, 28 U.S.C. 1605(a)(7), 28 U.S.C. 1610 and section 201 of the Terrorism Risk Insurance Act." President's Message to Congress Reporting the Declaration of a National Emergency with Respect to the Development Fund of Iraq, 39 Weekly Comp. Pres. Docs. No. 21, at 647-48 (May 22, 2003) (attached hereto at Tab 3). Thus, effective May 7, 2003, the date of the Presidential Determination, the basis for plaintiffs' claims that Section 1605(a)(7) abrogated Iraq's sovereign immunity from suit was removed, and with it Article III jurisdiction to litigate this suit.[4]

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[4] The D.C. Circuit, in *Acree v. Iraq*, No. 03-5232, is currently considering the effect of Presidential Determination No. 2003-23 on subject-matter jurisdiction in a Section 1605(a)(7) case against Iraq. Briefing in *Acree* has been completed, and oral argument is scheduled for April 15, 2004.

DISCUSSION

I. THE COURT LACKS SUBJECT-MATTER JURISDICTION OVER THIS ACTION

The FSIA provides that foreign governments and their agencies or instrumentalities "shall be immune from the jurisdiction of the courts of the United States," unless one of the FSIA's specific exceptions is met. 28 U.S.C. § 1604. Indeed, the FSIA is "the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). Thus, the FSIA "must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Id.* at 434-35 (quoting *Verlinden B.V.*, 461 U.S. at 493). One such exception—Section 1605(a)(7)—abrogates that immunity in certain suits against foreign states that have been designated as sponsors of terrorism.

Plaintiffs' complaint identified 28 U.S.C. § 1605(a)(7) as the basis for subject-matter jurisdiction in this suit. As of May 7, 2003, however, Congress' enactment of Section 1503 of the EWSAA, as implemented by Presidential Determination No. 2003-23, rendered Section 1605(a)(7) inapplicable to Iraq, thus depriving the Court of jurisdiction under 28 U.S.C. § 1330. Because Congress and the President together have removed the sole jurisdictional basis for this suit, there is no longer any authority for this Court to exercise jurisdiction over plaintiffs' complaint. Accordingly, this action must be dismissed.

A. Congress and the President Made Section 1605(a)(7) of the FSIA Inapplicable to Iraq, Thereby Restoring Iraq's Sovereign Immunity over Claims Brought Pursuant to that Provision

The EWSAA authorized the President to "make inapplicable with respect to Iraq . . . any . . . provision of law that applies to countries that have supported terrorism." Pub. L. No. 108-11, § 1503 (Tab 1). In passing the EWSAA, Congress thus restored to the Executive Branch in some measure the authority, exercised before the enactment of the FSIA, to determine if a foreign state could be sued in United States courts.[5] *See, e.g., Verlinden B.V.*, 461 U.S. at 486-87 ("[T]his Court consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on

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[5] Congress restored that authority with respect to a category of claims that did not fall within the general exemptions to foreign sovereign immunity enacted in 1976, and that could be brought in U.S. courts under the special grant of authority in 28 U.S.C. § 1605(a)(7) only on the basis of a prior designation of the particular foreign state by the Executive Branch as a sponsor of terrorism. It therefore followed naturally from the nature of the special exemption from foreign sovereign immunity in Section 1605(a)(7) that Congress would confer on the President the authority to render that special exemption inapplicable in light of intervening developments in Iraq. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 307, 320 (1936) (upholding statute authorizing President to prohibit the sale of arms to certain countries if he found that such a prohibition would "contribute to the reestablishment of peace," because in the area of foreign affairs, where President has "plenary and exclusive" power, Congress "must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved").

whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities"; after 1952, "initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department and the courts abided by 'suggestions of immunity' from the State Department."); *Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 360 (1955) ("As the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit."); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1169 (D.C. Cir. 1994) ("The Department of State embraced the restrictive theory of immunity in 1952," whereby it "continued to advise courts on a case-by-case basis whether immunity should be granted.").

On May 7, 2003, President Bush implemented the statutory authority granted to him under Section 1503 of the EWSAA by issuing Presidential Determination No. 2003-23, which expressly made inapplicable to Iraq "section 620A of the Foreign Assistance Act of 1961, Public Law 87-195, as amended (the 'FAA'), and any other provision of law that applies to countries that have supported terrorism." Presidential Determination No. 2003-23 (Tab 2).

The effect of these combined legislative and executive actions is clear: any statute that applies to foreign states because they have been designated as

sponsors of terrorism is rendered inapplicable to Iraq. The President expressly stated that his Determination No. 2003-23 rendered Section 1605(a)(7) inapplicable to Iraq. *See* President's Message to Congress (Tab 3) (explaining that the provisions of law made inapplicable to Iraq by the Determination "include, but are not limited to, 28 U.S.C. 1605(a)(7), 28 U.S.C. 1610 and section 201 of the Terrorism Risk Insurance Act"). That conclusion is unassailable. By its terms, Section 1605(a)(7) is a "provision of law that applies to countries that have supported terrorism," because the statutory exception to foreign sovereign immunity requires that the foreign state must have been "designated as a state sponsor of terrorism." 28 U.S.C. § 1605(a)(7)(A).

The President's message to Congress identifies three examples of statutory provisions that are "ma[de] inapplicable" by his implementation of Section 1503 of the EWSAA—28 U.S.C. § 1605(a)(7), 28 U.S.C. § 1610, and Section 201 of the Terrorism Risk Insurance Act—in addition to Section 620A of the FAA, which is identified in Section 1503. All three of the statutes listed by the President are inter-related: Section 1610(a)(7) of the FSIA and Section 201 of the Terrorism Risk Insurance Act concern the attachment of property and other measures available to certain plaintiffs seeking to execute a judgment entered in a suit brought under Section 1605(a)(7).

Thus, Section 1503 of the EWSAA, as implemented by the President, makes Section 1605(a)(7) of the FSIA and related provisions "inapplicable" to Iraq. As a result, Iraq's sovereign immunity over suits brought pursuant to Section 1605(a)(7) has been restored.

B. The Presidential Determination Restoring Iraq's Sovereign Immunity over Claims Brought Pursuant to Section 1605(a)(7) was Effective Immediately as to All Pending Claims

The President's determination to make Section 1605(a)(7) inapplicable with respect to Iraq had immediate effect on all pending claims and requires dismissal of this suit. In enacting Section 1503, Congress authorized the President to "make inapplicable with respect to Iraq" any law that "applies to countries that have supported terrorism." Pub. L. 108-11, § 1503. The use of the present tense "make inapplicable" in Section 1503 and in the Presidential Determination is plainly intended to negate the *current* effect of any law that otherwise would apply to Iraq by virtue of that country's designation as a state sponsor of terrorism. Moreover, Section 1503's use of the present perfect tense, authorizing the President to make inapplicable laws that apply to "countries that *have supported* terrorism," (emphasis added), further confirms Congress' intent to allow the President to reinstate Iraq's sovereign immunity with respect to pending cases relating to past acts of terrorism. Thus, once the President acted, the courts were immediately prevented from exercising jurisdiction over any claim brought under Section 1605(a)(7), irrespective of when the claim was filed or when the underlying conduct occurred.

The immediate effect of Section 1503 and the Presidential Determination is entirely consistent with their underlying foreign policy objectives. When Saddam Hussein was in power, Iraq supported international terrorism; as a result, United States

law imposed on Iraq a wide range of legal and economic sanctions designed to discourage that misconduct. *See*, *e.g.*, 10 U.S.C. § 2249a(a) (loss of Department of Defense assistance); *id.* § 2327(b) (loss of military contracts); 15 U.S.C. § 7410(b) (loss of grants and fellowships to Iraqi nationals); 22 U.S.C. § 2371(a) (loss of aid under Foreign Assistance Act); 26 U.S.C. § 901(j)(2)(iv) (loss of foreign tax credits); 50 U.S.C. App. § 2505(j) (trade restrictions under Export Administration Act). One important component of these sanctions was the special provisions regarding entry and enforcement of judgments against state sponsors of terrorism: 28 U.S.C. § 1605(a)(7), which restricts the foreign sovereign immunity of designated state sponsors of terrorism; 28 U.S.C. § 1610(a)(7), which restricts foreign sovereign immunity from execution of judgments based on § 1605(a)(7); and section 201 of TRIA, which further restricts that immunity from execution, *see* 116 Stat. at 2337-40.

With the ouster of Saddam Hussein and his regime from power, however, our national security and foreign policy interests towards Iraq changed fundamentally. Now, rather than seeking to impose *sanctions* on Iraq, Congress and the President have sought to provide *assistance* to facilitate the prompt and orderly reconstruction of Iraq, and thereby to promote the emergence of a stable, peaceful, and democratic new Iraqi government. In the EWSAA itself, Congress appropriated almost $2.5 billion "for rehabilitation and reconstruction in Iraq," 117 Stat. at 573, and Section 1503, as already discussed, gave the President the authority to make inapplicable to Iraq statutes such as Section 1605(a)(7) that imposed sanctions on Iraq for its terrorist behavior.

Subsequently, Congress appropriated an additional $18.4 billion in reconstruction assistance. *See* Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, 117 Stat. 1209, 1225-26 (Nov. 6, 2003). Similarly, the President has sought to ensure the availability of Iraqi and other assets for reconstruction, by committing vested assets to reconstruction activities, *see* Exec. Order 13290, 68 Fed. Reg. at 14307; by nullifying any United States "judgment" or "execution" against specified Iraqi assets, *see* Exec. Order 13303, 68 Fed. Reg. at 31931-32; and by urging other nations to reduce Iraq's large foreign debt and to make Iraqi assets immediately available for reconstruction. The President has also determined that adequate funding for reconstruction is "in the interest of and for the benefit of the United States," *see* Exec. Order 13290, 68 Fed. Reg. at 14307; that the entry and enforcement of judgments against major Iraqi assets constitutes an "unusual and extraordinary threat to the national security and foreign policy of the United States," *see* Exec. Order 13303, 68 Fed. Reg. at 31931; and that "other Iraqi resources" likewise should not be subject to "judgment" or "execution" during the reconstruction process, *see* Message to Congress, at 647 (Tab 3). These policy judgments of Congress and the President are shared by the United Nations Security Council, which itself has undertaken to provide substantial funding for Iraqi reconstruction, *see* United Nations Security Counsel Resolution ("UNSCR") 1483 § 17, to confer litigation immunities upon the principal Iraqi assets at this juncture, *see id.* § 22, and to defer the presentation of specific claims against Iraq until a new "internationally

recognized, representative government of Iraq" is safely constituted, *id.* § 23.

Against this backdrop, Section 1503 and Presidential Determination No. 2003-23 cannot plausibly be construed to provide an implied exception for previously-filed terrorism-related cases. The continuing imposition of *any* damages awards under Section 1605(a)(7), whether related to future or pending cases, posed a serious threat to the crucial foreign policy goal of promptly rebuilding Iraq into a democratic, self-sustaining nation. To prevent the nascent Iraqi government from becoming hobbled with liability judgments arising from the Hussein dictatorship, Congress and the President thus acted to make *immediately* inapplicable federal laws that otherwise applied to Iraq by virtue of its terrorist activity, thereby restoring Iraq's immunity from *all* suits brought pursuant to Section 1605(a)(7).

Significantly, the authority conferred by Congress in Section 1503 is broader in both form and effect than the pre-existing authority to rescind the designation of Iraq as a state sponsor of terrorism. *See* 50 U.S.C. App. § 2405(j)(4); 22 U.S.C. § 2371(c). The effect of a rescission under these statutes would be to restore Iraq's immunity from suit for acts that occur after the rescission, but to leave Iraq subject to suit for its conduct while still designated as a state sponsor of terrorism. *See* 28 U.S.C. § 1605(a)(7) (abrogating foreign state immunity if the state "was designated as a state sponsor of terrorism . . . at the time the act occurred"). By contrast, through the grant by Congress in Section 1503, the President's Determination negates the current effect of Section 1605(a)(7) altogether, regardless of when the underlying conduct occurred. Congress did not, for

instance, use language such as "rescission" (or "de-designation") in Section 1503, but more broadly authorized the President to render terrorism-based statutes inapplicable. It is hardly surprising that Congress and the President viewed the situation in Iraq—where the prior terrorist-sponsoring government was forcibly removed by the United States through military action and where continued liability for terrorist acts of the previous regime would significantly interfere with the successful establishment of a new, peaceful government—as requiring broader action than a situation where a designated state merely ceased supporting terrorism.

Giving immediate effect to the President's Determination under Section 1503 as to all pending terrorism-related claims is also consistent with the controlling presumption for laws implementing foreign policy, and with the frequent practice of the President and Congress in subordinating individual claims against foreign governments to the Nation's larger foreign policy interests.

The Supreme Court has explained that, in the foreign affairs context, the courts should give full and immediate effect to laws reflecting a change in the Nation's foreign policy. In *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), a unanimous Court held that a treaty between the United States and France deprived the court of jurisdiction over a condemned vessel, even though in that case, unlike here, the lower court had already rendered judgment before the intervening legal change. *See id.* at 110. As the Court explained, "in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties; but in great

national concerns where individual rights acquired by war are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import." *Id.*

Further, it is well-established that hostage-related claims such as plaintiffs', which obviously implicate the Nation's foreign policy, are subject to preclusion or settlement by the President and Congress as the country's overriding foreign policy interests from time to time demand. *See Dames & Moore v. Regan*, 453 U.S. 654, 679-80 (1981) (holding that the President had power to suspend claims against Iran arising out of hostage crisis and finding it "undisputed that the United States has sometimes disposed of the claims of its citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole") (internal quotation marks and citation omitted); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 235 (D.C. Cir. 2003) (holding, with regard to agreement eliminating jurisdiction over claims against Iran arising out of the American Embassy hostage crisis, that "[t]he authority of the President to settle claims of American nationals through executive agreements is clear"); *see also American Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2386-87 (2003) (President's authority to settle claims of American nationals against foreign governments is "indisputable" and "particularly longstanding," dating back "over 200 years"); *Joo*, 332 F.3d at 684-85 (noting that the 1951 Treaty of Peace with Japan "manifests the parties' intent to resolve matters arising from World War II without involving the courts of the United States").

The authority of the political branches to resolve claims affecting U.S. foreign relations includes the power to terminate already pending claims, as *The Schooner Peggy*, discussed above, itself made clear. *See also Dames & Moore*, 453 U.S. at 666, 686 (President had power to suspend all claims against Iran in any action "pending in any court of the United States"). As these cases demonstrate, because of their obvious foreign policy implications, claims such as plaintiffs' are subject to immediate curtailment, and even extinguishment, by the political branches, as necessary to reflect the Nation's changing foreign policy.[6]

By making Section 1605(a)(7) immediately inapplicable to pending claims, the EWSAA and Presidential Determination do not run afoul of the non-retroactivity principle articulated by the Supreme Court in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). That doctrine is designed, in the absence of a clear statement, to protect "vested rights" or "settled expectations." *I.N.S. v. St. Cyr*, 533 U.S. 289, 320-21 (2001), and is inapplicable here because the restoration to Iraq of its immunity from suit does not impair any "settled expectation" that plaintiffs would be able to litigate their claims to

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[6] For similar reasons, the Federal Circuit has concluded that the settlement of such claims by the United States does not constitute a "taking" for which compensation must be paid under the Fifth Amendment. *See, e.g., Abrahim-Youri v. United States*, 139 F.3d 1462, 1468 (Fed. Cir. 1997) (holding that mass settlement, pursuant to the Algiers Accords, of certain claims against Iran did not constitute a taking in light of fact that the government's authority to intercede with respect to plaintiffs' claims against a foreign government formed part of the background law that defined the scope of plaintiffs' property rights).

judgment in the face of dramatic shift in our Nation's foreign affairs. *See Natural Res. Def. Council v. United States Nuclear Regulatory Comm'n*, 580 F.2d 698, 699 (D.C. Cir. 1978) (noting a "reduced room for justifiable expectation" in "the foreign policy context").

Indeed, in 1993 and 1995, at the time of the underlying conduct on which plaintiffs' claims are based, Section 1605(a)(7) had not yet been enacted, and plaintiffs thus had no right or expectation to litigate their claims against Iraq in the courts of the United States.[7] When the anti-terrorism exception was added to the FSIA in 1996, plaintiffs were beneficiaries of the new foreign policy objective underlying Section 1605(a)(7). Yet, in light of the well-established legal principles discussed above, plaintiffs reasonably would have understood that the newly granted ability to sue Iraq in 1996 could be eliminated just as quickly if a change in the Nation's

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[7] As previously discussed, jurisdiction over a foreign state has been the exception rather than the rule. Thus, in the context of sovereign immunity it is ordinarily the *foreign state* that has the relevant settled expectation. For example, in *Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003), the D.C. Circuit concluded that "because Japan had a settled expectation in the 1930s and 1940s that its commercial activities would not be subject to suit in a court of the United States, application of the commercial activity exception of the FSIA to acts occurring then would clearly be retroactive in effect." *Id.* at 684. Here, by contrast, plaintiffs could not have possibly had a settled expectation at the time of their mistreatment in 1993 and 1995 that they would be able to litigate to judgment their claims against Iraq in U.S. courts, not only because of the longstanding authority of the political branches to terminate claims against foreign governments, but also because Section 1605(a)(7), the only alleged basis for this Court's jurisdiction over plaintiffs' claims, was not enacted until 1996.

foreign policy so required.[8] One can hardly imagine a more drastic change in foreign policy than has occurred with respect to Iraq, where the United States has by military force, removed the Hussein regime from power and is leading the effort to establish a new, stable, and democratic government to take its place. Thus, Congress and the President's termination of the Court's jurisdiction over plaintiffs' claims by rendering Section 1605(a)(7) "inapplicable" to Iraq was fully in keeping with their indisputable authority to terminate claims that stand as an obstacle to achieving the Nation's foreign policy goals.[9]

Finally, application of a clear statement rule to deny the EWSAA of its natural effect would be

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[8] Indeed, for several years after Section 1605(a)(7) was added, even if plaintiffs brought successful claims against foreign sovereigns under that provision, they often had little reason to expect that they would actually be able to collect on their judgments. That did not change until late 2002, with the enactment of Section 201 of the Terrorism Risk Insurance Act, Pub. L. No. 107-297, 116 Stat. 2322, 2337 (2002)—another provision that has now been made inapplicable to Iraq by Presidential Determination No. 2003-23. *See* Message to Congress, at 648 (Tab 3).

[9] Here, notably, Congress and the President have not extinguished plaintiffs' claims on the merits, though, plainly, under the authority cited above, they could have. Rather, Congress and the President have taken the lesser step of restoring to Iraq the immunity that it, like all other states, enjoyed at the time of the challenged conduct. The effect, therefore, is to preserve plaintiffs' claims (and the claims of other, similarly situated, persons) pending the establishment of a successor government capable of negotiating the diplomatic or other resolution of claims arising from the misdeeds of its predecessor. This result is consistent with the policy of the United Nations. *See* UNSCR 1483 § 23.

contrary to the Supreme Court's clear holding in *The Schooner Peggy* that, in the foreign affairs context, courts will not require a particularly clear statement before giving immediate effect to a new law reflecting a change in the Nation's foreign policy. 5 U.S. (1 Cranch) at 110. Such a rule would also be inappropriate in light of the President's wide discretion to act independently in the area of foreign affairs. As the Supreme Court held in *Curtiss-Wright*, the President possesses a "plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress . . . ." 299 U.S. at 320. Thus, the "failure of Congress specifically to delegate authority does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive." *Dames & Moore*, 453 U.S. at 678.

That the President has the power to act without specific Congressional authorization in the realm of foreign affairs demonstrates the breadth of his power here, where Congress specifically provided him, in unqualified terms, the broad authority to "make inapplicable with respect to Iraq . . . *any* . . . provision of law that applies to countries that have supported terrorism." Pub. L. No. 108-11, § 1503 (emphasis added). Indeed, when the President acts pursuant to such congressional authorization, "his authority is at its maximum," and is "supported by the strongest of presumptions and the widest latitude of judicial interpretation." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 637 (1952) (Jackson, J., concurring). Therefore, even absent a specific statement of Congress that Section

1605(a)(7) may be made inapplicable to pending cases, the President has the independent authority to reach that reasonable conclusion himself, because, at the very least, Section 1503 of the EWSAA "evinces legislative intent to accord the President broad discretion," and thus "may be considered to 'invite' 'measures on independent presidential responsibility.'" *Dames & Moore*, 453 U.S. at 678 (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)); *see also Loving v. United States*, 517 U.S. 748, 772 (1996) ("The delegated duty . . . is interlinked with duties already assigned to the President by express terms of the Constitution, and the same limitations on delegation do not apply where the entity exercising the delegated authority itself possesses independent authority over the subject matter." (internal quotation marks omitted)). In the context of the critical and complex foreign policy interests at stake in the Iraqi reconstruction effort, Congress granted the President sufficient latitude to ensure that the reinstatement of Iraq's immunity would adequately protect the new Iraqi government from suits that could undermine that nation's fiscal well-being.

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When the Saddam Hussein regime was in power, the United States had a foreign policy interest in allowing victims of certain Iraqi abuses to sue Iraq in U.S. courts. When that regime was removed from power, U.S. foreign policy interests toward Iraq changed fundamentally. Congress recognized that, in order to promote the reconstruction of Iraq and to put the country on the path toward a more stable and prosperous future, it would be important for the Executive Branch to have the flexibility to render

inapplicable provisions of U.S. law that had penalized the former Iraqi regime. The President promptly exercised the authority provided by Congress and rendered immediately inapplicable all provisions of law that applied to Iraq by virtue of its sponsorship of terrorism, including Section 1605(a)(7). The Court must give effect to that foreign policy determination.

C. The District Court's Premature Ruling on Subject-Matter Jurisdiction in *Acree v. Republic of Iraq* was Erroneous

On July 21, 2003, the United States moved to intervene in *Acree v. Republic of Iraq*, Civil Action No. 02-0632 (D.D.C.) (Roberts, J.), and concurrently moved, pursuant to Federal Rule of Civil Procedure 59(e), to vacate the default judgment entered against Iraq in that action.[10] The United States' Rule 59(e) motion in *Acree* was based on the same subject-matter jurisdiction deficiency discussed herein.

On July 25, 2003, plaintiffs in *Acree* filed an opposition to the United States' Motion to Intervene, but did not respond at that time to the United States' substantive Rule 59(e) motion that raised the subject-matter jurisdiction issue. On August 6, 2003, the Court denied the United States' Motion to Intervene,[11] and—without the benefit of full briefing

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[10] On July 7, 2003, plaintiffs in *Acree*, former prisoners of war from the first Gulf War and some of their family members, won a default judgment against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein in his official capacity as the President of Iraq, and were awarded $653,070,000 in compensatory damages and $306,000,000 in punitive damages.

[11] Judge Roberts' ruling in *Acree* on the timeliness of intervention is inapposite here because the United States is not

on the issue—found *sua sponte* that the Court had subject-matter jurisdiction to enter a judgment against Iraq. *See Acree v. Republic of Iraq*, 276 F. Supp. 2d 95 (D.D.C. 2003), *appeal pending*, No. 03-5232 (D.C. Cir.).

Judge Roberts' ruling on subject-matter jurisdiction, which is currently under review by the D.C. Circuit, *see* n.4, *supra*, should not be followed here because it was based on several erroneous grounds. First, Judge Roberts held that it was "undisputed that at the time [the] lawsuit was filed, the sovereign immunity of Iraq, Saddam Hussein, and the Iraqi Intelligence Service had been waived under the FSIA and the Court had subject matter jurisdiction." *Acree*, 276 F. Supp. 2d at 100. Although plaintiffs had not made such an argument, Judge Roberts thus held that Section 1503 of the EWSAA and the Presidential Determination "could not operate . . . to restore Iraq's sovereign immunity which had previously been waived." *Id.* at 101.

Contrary to Judge Roberts' opinion, however, it was not undisputed that the sovereign immunity of Iraq, Saddam Hussein, and the Iraqi Intelligence Service had been *waived* under the FSIA. Rather, it was undisputed that, at the time the lawsuit was filed in 2002, Iraq's sovereign immunity had been *abrogated* pursuant to Section 1605(a)(7) and the Secretary of State's designation of Iraq as a state sponsor of terrorism. The waiver exception to foreign sovereign immunity, which is triggered when the foreign state

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currently seeking to intervene, but is instead filing a Statement of Interest pursuant to the Court's invitation and pursuant to its right to do so under 28 U.S.C. § 517. The United States does, however, reserve its right to seek to intervene in this action for the purposes of appeal, if necessary.

itself accedes to participation in a lawsuit, is separate and distinct from the other statutory exceptions to immunity under the FSIA, which do not require the foreign state's consent. *See* 28 U.S.C. § 1605(a)(1) (providing that a foreign state shall not be immune in any case "in which *the foreign state has waived* its immunity either explicitly or by implication" (emphasis added)).[12]

In a one-sentence footnote, Judge Roberts extended the reasoning of Section 1605(a)(1) waiver cases to Section 1605(a)(7), *see* 276 F. Supp. 2d at 101 n.5, but such a proposition is contrary to well-settled law. Indeed, the D.C. Circuit has previously held that a waiver under the FSIA requires "intentionality," and therefore "depends upon the foreign government's having at some point indicated its amenability to suit." *Princz*, 26 F.3d at 1174; *see also Joo*, 332 F.3d at 686-87 (reaffirming *Princz*); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990) ("courts rarely find that a nation has waived its sovereign immunity. . . without strong evidence that this is what the foreign state intended") (quoting *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985)).[13] The examples of implied waivers set forth

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[12] Section 1605(a)(1) also notes that a foreign sovereign is not immune in any case in which the state has waived its immunity "notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver." Section 1605(a)(7), by contrast, includes no such language. Thus, there is obviously no reason to extend the reasoning of Section 1605(a)(1) cases regarding the restoration of immunity to Section 1605(a)(7) cases.

[13] In all of the cases cited by Judge Roberts in support of his holding on waiver, *see Acree*, 276 F. Supp. 2d at 100-01, the foreign state itself either expressly or implicitly waived its

in the legislative history of Section 1605(a)(1) all arise "either from the foreign state's agreement (to arbitration or to a particular choice of law) or from its filing a responsive pleading without raising the defense of sovereign immunity," *Princz*, 26 F.3d at 1174, and courts "have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity." *Id.* (quoting *Frolova*, 761 F.2d at 377). Thus, the D.C. Circuit has rejected claims that foreign states implicitly waive their sovereign immunity when they commit acts that violate *jus cogens* norms, or fundamental principles of international law. *See Joo*, 332 F.3d at 686-87 (Japan did not waive sovereign immunity by subjecting women to sexual slavery and torture before and during World War II); *Princz*, 26 F.3d at 1173-74 (Nazi atrocities of World War II did not waive Germany's sovereign immunity); *see also Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242-45 (2d Cir. 1997) (Libya's alleged

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immunity under Section 1605(a)(1) in accordance with the recognized intentionality requirement. *See Aguamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1292-93, 1300 (11th Cir. 1999) (holding that affidavit of Ecuador's Ambassador expressly waived sovereign immunity of Ecuadorian governmental agency); *Rodriguez v. Transnave, Inc.*, 810 F. Supp. 194, 196 (S.D. Tex. 1993) (Ecuadorian governmental entity waived its sovereign immunity when it voluntarily appeared in suit and asserted "without qualification" that Court had jurisdiction); *Ipitrade Int'l, S.A. v. Federal Republic of Nigeria*, 465 F. Supp. 824, 826 (D.D.C. 1978) (Nigeria's agreement to adjudicate all disputes arising under a contract in accordance with Swiss law and by arbitration under International Chamber of Commerce rules constituted a waiver of sovereign immunity).

participation in the bombing of Pam Am Flight 103 did not waive sovereign immunity under FSIA).

Plaintiffs here assert jurisdiction over Iraq pursuant to Section 1605(a)(7), not the waiver provision of Section 1605(a)(1). And unlike Section 1605(a)(1), Section 1605(a)(7) does not provide a basis for jurisdiction over a foreign state based on the *state's* intentional acquiescence in being sued. Rather, Section 1605(a)(7) derives from the *United States'* foreign policy determination in 1996 to abrogate the immunity of certain states over suits based on terrorist acts, a determination that is subject to change as the political branches see fit. Because Iraq neither waived its sovereign immunity in this action nor in *Acree*, Judge Roberts' opinion should not be followed.

In his ruling on waiver, Judge Roberts also cited *Daingerfield Island Protective Society v. Lujan*, 920 F.2d 32, 36 (D.C. Cir. 1990), for the proposition that "absent a clear statement to the contrary, legislation should not . . . be interpreted to oust a federal court's . . . jurisdiction over a present case." To the extent that Judge Roberts was insisting upon a clear statement before giving immediate effect to Section 1503 and the Presidential Determination insofar as they ousted the courts of jurisdiction over pending cases, such a conclusion was erroneous. In *Landgraf*, the Supreme Court explained that statutes "ousting jurisdiction" ordinarily become immediately applicable to pending cases "whether or not jurisdiction lay when the underlying conduct occurred *or when suit was filed*." 511 U.S. at 273 (emphasis added). The Supreme Court has invoked and applied that principle repeatedly. *See, e.g., Bruner v. United States*, 343 U.S. 112, 116-17 (1952)

("[W]hen a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law"; this rule "has been adhered to consistently by this Court."); *Hallowell v. Commons*, 239 U.S. 506, 508 (1916) (ousting provision "made no exception for pending litigation, but purported to be universal, and so to take away the jurisdiction that for a time had been conferred upon the courts of the United States"); *Sherman v. Grinnell*, 123 U.S. 679, 680 (1887) ("'[I]f a law conferring jurisdiction is repealed without a reservation as to pending cases, all such cases fall with the law.'" (quoting *Railroad Co. v. Grant* 98 U.S. (8 Otto) 398, 401 (1878))); *The Assessors v. Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1869) ("Jurisdiction . . . was conferred by an act of Congress, and when that act of Congress was repealed the power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the act of Congress."); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) ("Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."); *id.* ("[N]o judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted.").

These principles apply regardless of whether or not there is an alternative judicial forum with continuing jurisdiction over the pending claim. In *Hallowell*, for example, the Supreme Court gave immediate effect to a statute that divested the district courts of jurisdiction to review certain Indian probate determinations made by the Secretary of the Interior. *See* 239 U.S. at 507-08. Speaking

unanimously through Justice Holmes, the Court concluded that the statute "takes away no substantive right," but, by making "final and conclusive" an *Executive* Branch determination, "simply changes the tribunal that is to hear the case." *Id.* at 508. Similarly, in *Bruner*, the Supreme Court gave immediate effect to an amendment that, by restricting the applicable provision of the Tucker Act, restored the federal government's sovereign immunity from the disputed claim at issue. *See* 343 U.S. at 113-14. Anticipating its subsequent analysis in *Landgraf*, the Court specifically explained that "this jurisdictional rule does not affect the general principle that a statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication." *Id.* at 117 n.8 (quoted in *Landgraf*, 511 U.S. at 274 n.27).

Judge Roberts erroneously claimed support from *Daingerfield Island*. That case involved a statute divesting the courts of jurisdiction to consider the "factual and legal sufficiency" of an environmental impact statement ("EIS") prepared under the National Environmental Policy Act of 1969. *See* 920 F.3d at 35-36. However, the statute contained another provision stating that the EIS was "separate from, independent of, and in no way intended to affect or modify any pending litigation." *See id.* at 35. Applying the plain language of both provisions, the D.C. Circuit held that the intervening statute *did* divest the district court of jurisdiction over a NEPA claim pending before that court when the statute was enacted, but did not divest the court of jurisdiction over *other* claims independent of any challenge to the EIS. *See id.* at 36-37. To be sure, the Court did briefly state (without elaboration) that a "clear

statement" is necessary to "oust" jurisdiction in pending cases, *see id.* at 36, but it did not cite *Hallowell*, *Bruner*, or any of the other contrary Supreme Court cases, much less attempt to reconcile its own dictum with those cases. In any event, to the extent *Daingerfield Island* might suggest that a "clear statement" is necessary to give immediate effect to statutes ousting a court of jurisdiction, that suggestion is flatly inconsistent with subsequent decisions in *Landgraf*, *see* 511 U.S. at 274, and *LaFontant v. INS*, 135 F.3d 158, 161-63 (D.C. Cir. 1998), which explain at length that *Hallowell* and *Bruner* remain good law. Indeed, in *LaFontant*, the D.C. Circuit specifically applied *Hallowell* to give immediate effect to a statute barring any judicial review of certain administrative orders of deportation. *See id.* at 165. The Court explained that the provision at issue, by making conclusive administrative adjudications rendered by the Executive Branch, "'takes away no substantive right, but simply changes the tribunal that is to hear the case." *Id.* at 162 (quoting *Hallowell*, 238 U.S. at 508).[14]

Finally, Judge Roberts held that, even if the Presidential Determination operated to restore Iraq's sovereign immunity, "the defense of sovereign immunity could be asserted only by Iraq, not by the United States."[15] *Acree*, 276 F. Supp. 2d at 101. The

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[14] As discussed above, a clear statement rule is also inappropriate in the context of foreign affairs. *See* sub-section I.B., *supra*.

[15] Judge Roberts own reasoning on this point was internally inconsistent, because he also recognized that a court "has an obligation to determine *sua sponte*" whether it has subject-matter jurisdiction. *Acree*, 276 F. Supp. 2d at 100 (citing

United States, however, is not seeking to assert a defense on behalf of Iraq (nor was it seeking to do so in *Acree*). Rather, as already discussed, the United States is appearing in this action to protect its substantial foreign policy interest in restoring sovereign immunity to a liberated Iraq and its "undeniable interest in the enforcement" of the EWSAA and Presidential Determination No. 2003-23. *Roeder*, 195 F. Supp. at 155; *see also Roeder*, 333 F.3d at 233 (holding that interest of the United States was not in providing Iran with a defense, but in upholding an executive agreement with Iran). Furthermore, as this Court has essentially recognized by raising the jurisdictional issue *sua sponte* and by inviting the United States to file this Statement of Interest, Iraq's appearance is not necessary to bring the jurisdictional issue before the Court. As the Supreme Court has expressly held, "even if the foreign state does not enter an appearance to assert an immunity defense, a District Court still must determine that immunity is unavailable under the Act," because "subject matter jurisdiction turns on the existence of an exception" under the FSIA. *Verlinden B.V.*, 461 U.S. at 494 n.20. Thus, even though Iraq has not asserted sovereign immunity in this action, the Court must still address its subject-matter jurisdiction.[16]

Murphy Exploration & Production Co. v. Department of Interior, 252 F.3d 473, 479-80 (D.C. Cir. 2001)).

[16] Judge Roberts also held that "even if Iraq's sovereign immunity could be restored . . .and even if the United States could raise the defense of sovereign immunity on behalf of Iraq," the Court still had subject-matter jurisdiction to enter judgment against Saddam Hussein and the Iraqi Intelligence Service, because neither the EWSAA nor the Presidential Determination mentioned those two defendants by name. *Acree*,

D. Without Jurisdiction, the Court Can No Longer Proceed and Must Dismiss This Action

When it becomes clear at any point before or after judgment that a Court lacks jurisdiction, it must dismiss the case, and any judgment entered without jurisdiction is necessarily void. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it

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276 F. Supp. 2d at 101. That ruling is inapplicable here, where the only named defendant is the Republic of Iraq. Nevertheless, Judge Roberts erred on this point as well.

According to Judge Roberts' reasoning, any plaintiff could get around the jurisdictional bar to Section 1605(a)(7) suits against Iraq simply by recasting the form of his complaint to name an Iraqi official or agency as an official-capacity defendant. That reasoning is internally inconsistent. Section 1605(a)(7)—the sole provision asserted by plaintiffs in *Acree* (and here) as a basis for an abrogation of sovereign immunity—by its terms provides jurisdiction only for certain claims "against a foreign state." Thus, the premise of plaintiffs' assertion in *Acree* that the Court had jurisdiction over the Iraqi Intelligence Service and the former Iraqi President in his official capacity was, necessarily, that those entities were part of the state of Iraq for purposes of Section 1605(a)(7). *See Roeder*, 333 F.3d at 234 (Iranian foreign ministry was part of Iran itself: "if the core functions of the entity are governmental, it is considered the foreign state itself; if commercial, the entity is an agency or instrumentality of the foreign state"); 28 U.S.C. § 1603 (for purposes of the FSIA, "foreign state" includes an agency or instrumentality of such state). Therefore, assuming arguendo that Section 1605(a)(7) could serve as a basis for abrogating the immunity of the Iraqi Intelligence Service and Saddam Hussein, if that provision is rendered inapplicable to Iraq, it would also be rendered inapplicable to the head of state and other officials and entities that were sued as a part of the state. Accordingly, it was unnecessary for Congress and the President explicitly to render Section 1605(a)(7) inapplicable to any specific entity in addition to rendering that provision inapplicable to Iraq.

ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). In *McCardle*, as in this case, the relevant statute conferred jurisdiction at the time the case was brought, but, while the case was pending before the Supreme Court, Congress rendered inapplicable the statute that gave the Court jurisdiction over the case, requiring dismissal.

Likewise, in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), the plaintiffs sued the Government for allegedly targeting them for deportation because of their affiliation with a politically unpopular group. While the suit was pending, Congress enacted new legislation eliminating judicial review "of the Attorney General's 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders against any alien under'" the Immigration and Nationality Act. *Id.* at 472 (quoting 8 U.S.C. § 1252(g)). Because the plaintiffs' case was a challenge to the Attorney General's decision to deport them, the Supreme Court held that the federal courts lacked jurisdiction over the case. *Id.* at 487, 492.

Here, Section 1503, as implemented by the President, "make[s] inapplicable with respect to Iraq" the jurisdictional provision relied on by plaintiffs in this action. Just as in *McCardle* and *American-Arab*, the inapplicability of the relevant jurisdictional statute while the case is pending compels the conclusion that this Court lacked subject-matter jurisdiction as of May 7, 2003. Therefore, plaintiffs' complaint must be dismissed.

II. PLAINTIFFS HAVE NOT PLED A VIABLE CAUSE OF ACTION AGAINST IRAQ

Because the Court has been divested of subject-matter jurisdiction in this action and must therefore immediately dismiss this case, the Court need not reach the question of whether plaintiffs have pled a viable cause of action against the Republic of Iraq. If the Court should find it necessary to rule on that issue, however, the D.C. Circuit's recent decision in *Cicippio-Puleo* is dispositive.

In *Cicippio-Puleo*, the D.C. Circuit held that "neither 28 U.S.C. § 1605(a)(7) nor the Flatow Amendment, nor the two considered in tandem, creates a private right of action against a foreign government." 353 F.3d at 1033. As the Court explained, "Section 1605(a)(7) merely waives the immunity of a foreign state without creating a cause of action against it, and the Flatow Amendment only provides a private right of action against officials, employees, and agents of a foreign state, not against the foreign state itself." *Id.*

Plaintiffs' complaint appears to rely solely on Section 1605(a)(7) as the source of a substantive cause of action against Iraq. Therefore, *Cicippio-Puleo* requires that plaintiffs' complaint, at least as currently pled, must also be dismissed for failure to state a cause of action.[17]

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[17] Unlike in *Cicippio-Puleo*, however, plaintiffs should not be afforded an opportunity to cure their complaint by adding other potential causes of action. For reasons already discussed, Iraq's sovereign immunity over this suit has been restored, and the Court no longer has subject matter jurisdiction to consider this case.

CONCLUSION

For the foregoing reasons, this Court should dismiss plaintiffs' complaint for lack of subject-matter jurisdiction.

Dated: March 15, 2004

Respectfully submitted,

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APPENDIX L

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ROBIN BEATY, *et al.*, Plaintiffs, v. REPUBLIC OF IRAQ, Defendant.	Civil Action No. 03-0215 (JDB)

PLAINTIFFS' RESPONSE TO STATEMENT OF INTEREST OF THE UNITED STATES

Plaintiffs respectfully submit this Memorandum in response to the Statement of Interest of the United States.

BACKGROUND

The underlying facts of this case are not in dispute.[1] Plaintiffs Jordan Beaty and Austin Makenzie Beaty are the daughters of Kenneth Beaty,

[1] This action was filed as related case to *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 21 (D.D.C. 2001), in which this Court (Oberdorfer, J.) issued final judgments for monetary damages against Iraq in favor of, *inter alia*, Kenneth Beaty, William Barloon and their respective spouses, whose claims were based upon the same acts of hostage taking and torture addressed by Plaintiffs in this case.

an American civilian taken hostage and tortured by Iraq for 205 days. Plaintiffs William R. Barloon, Bryan C. Barloon and Rebecca L. Barloon are the children of William Barloon, who, like Kenneth Beaty, was held hostage by Iraq for some 126 days.

Following the conclusion of the first Gulf War in 1991, Kenneth Beaty and William Barloon began working in civilian capacities near the Iraq-Kuwait border. Mr. Beaty worked as an oil rig drilling supervisor, while Mr. Barloon supervised aircraft maintenance and overhaul. *See Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 21 (D.D.C. 2001).

On April 25, 1993, Mr. Beaty was taken hostage by Iraq and held in order to force the United States to provide humanitarian aid to, or lift sanctions against, Iraq. Iraqi officials ultimately released Mr. Beaty into the custody of Senator David Boren on November 14, 1993, after being held for 205 days. Complaint ¶ 8.

William Barloon was taken hostage by Iraqi border guards on March 13, 1995, and held as leverage to exact concessions from the United States. Complaint ¶ 6. Ultimately, Iraq released Mr. Barloon into the custody of Congressman William Richardson after 126 days as a hostage. Complaint ¶ 4.

Plaintiffs' suffering during their fathers' captivity was significant. They were deprived of their relationships with their fathers, and were totally dependent upon their mothers for financial and emotional support. Plaintiffs' anguish did not abate, even after their fathers' return. Although their fathers were physically present, they were emotionally absent, unable to provide the love and support their children so desperately needed. As Judge Oberdorfer recognized in *Daliberti*.

> Following their release, [Mr. Beaty and Mr. Barloon] exhibited marked changes in personality, such as anger, feelings of detachment and isolation, nightmares, and insomnia. Each [of them] has suffered significant damage to his marriage and has ongoing problems with intimacy and personal relationships . . . . [T]hese men will experience these effects for the rest of their lives.

Daliberti, 146 F. Supp. 2d at 23-24.

On February 10, 2003, Plaintiffs filed this action against Iraq seeking monetary damages, including loss of solatium, for their emotional distress. Plaintiffs invoked this Court's jurisdiction under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(7). In compliance with the requirements of the FSIA, Plaintiffs served their Complaint on Iraq on or about October 22, 2003.

ARGUMENT

I. The Construction of § 1503 Urged by the Government Violates the Presentment Clause of Article I of the Constitution

The Government asserts that § 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003 ("EWSAA"), Pub. L. No. 108-11, 117 Stat. 559, conferred upon the President the unfettered discretion to "make inapplicable with respect to Iraq" any provision of law that pertains to state sponsors of terrorism. Pursuant to § 1503, President Bush issued Presidential Determination 2003-23, 68 Fed. Reg. 26459 (May 16, 2003), which, as he explained in a May 22, 2003 message to Congress, retrospectively

eliminated the jurisdiction of Article III courts to adjudicate actions against Iraq set forth under § 1605(a)(7). (U.S. at 8). The Government characterizes this Determination as a valid exercise of the President's plenary and exclusive power over foreign affairs. *(See, e.g.*, U.S. at 7 n.5). In reality, however, the Determination—boiled down to its essence—is nothing more than a Presidential repeal of § 1605(a)(7) as it applies to Iraq, and is therefore violative of the Presentment Clause.

It is axiomatic that "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Clinton v. New York*, 524 U.S. 417, 438 (1998). To the contrary, "[r]epeal of statutes, no less than enactment, must conform with Art. I." *Id.* (quoting *INS v. Chadha*, 462 U.S. 919, 954 (1983)). Article I, in turn, requires that legislative Bills pass both Houses of Congress and be presented to the President for his approval and signature. *See* U.S. Const. Art. I, § 7 cl. 2. Statutes such as § 1503, which confer upon the President the power to repeal duly enacted legislation without bicameral approval or presentment, constitute an improper delegation of legislative power in contravention of Article I, and are therefore unconstitutional.

The Supreme Court has identified three factors used to determine whether a legislative delegation of authority violates the Presentment Clause of Article I. *See id.* at 443. First, any exercise of the authority conferred upon the President must be "contingent upon a condition that did not exist when the [legislation] was passed," *Id*, Second, the President, upon the occurrence of that contingency, must be under a duty to act, with no discretion in

that regard. *See id.* And third, in exercising the authority conferred upon him by Congress, the President must be "executing the policy that Congress had embodied in the statute." *Id.* at 444.

In *Clinton*, the Supreme Court addressed the constitutionality of the Line Item Veto Act, which gave the President the power to cancel direct spending items and tax benefits, including provisions of the duly enacted Balanced Budget and Taxpayer Relief Acts. *See id.* at 421, 436. The Court concluded that the Line Item Veto Act contravened the Presentment Clause because it impermissibly conferred upon the President the unilateral power to repeal duly enacted legislation. *See id.* at 442-43. Applying the criteria enunciated above, the Court found that: (1) "the exercise of the cancellation power within five days after the enactment of the Balanced Budget and Tax Reform Acts necessarily was based on the same conditions that Congress evaluated when it passed those statutes;" (2) the Line Item Veto Act contained no limitations on the President's discretion to cancel those provisions; and (3) the President, in canceling the various provisions, was "rejecting the policy judgment made by Congress and relying on his own policy judgment." *See id* at 443-44.

In an effort to salvage the Line Item Veto Act from constitutional attack, the Government in *Clinton* countered that the Act expressly authorized the President to repeal valid legislation. Thus, so the Government claimed, any cancellations made by the President pursuant to the Act did not violate the Presentment Clause, *See id* at 445. Rejecting this argument, the Court noted:

> The fact that Congress intended such a result is of no moment. Although Congress presumably anticipated that the President might cancel some of the items in the Balanced Budget Act and in the Taxpayer Relief Act, Congress cannot alter the procedures set out in Article I, § 7, without amending the Constitution.

Id. at 445-46.[2]

Like the Line Item Veto Act at issue in *Clinton*, § 1503 (as construed by the Government) impermissibly grants the President the power to repeal § 1605(a)(7) as it applies to Iraq, and therefore runs afoul of Article I's Presentment Clause. For one, the President's exercise of authority under § 1503 was not contingent upon any condition, let alone one not in existence when that legislation was passed. Moreover, the President's authority under § 1503 is clearly discretionary, as he is authorized (but not required) to make inapplicable to Iraq any provision of law that pertains to nations by virtue of their designation as a state supporter of terrorism. Finally, in exercising the authority conferred upon him pursuant to § 1503, the President was not "executing the policy that Congress had embodied in the statute," for as noted in Point IIB, *infra*. Congress did not manifest any

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[2] *See also id.* at 451-52 (Kennedy, J., concurring) ("It is no answer, of course, to say that Congress surrendered its authority by its own hand .... That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow").

intention to divest retroactively U.S. courts of jurisdiction over actions against Iraq.[3] Clearly, § 1503—having met each of the factors set forth in *Clinton*—constitutes an improper delegation of authority to the President to repeal § 1605(a)(7), and is therefore invalid under the Presentment Clause of the Constitution.

II. Section 1503 of the EWSAA Does Not Apply Retroactively to Restore Iraq's Sovereign Immunity for Terrorist Conduct Predating Its Enactment

In *Landgraf* and *Lindh*, the Supreme Court set out a three-part inquiry for considering the temporal reach of new federal enactments. Under this analysis, a court must first determine whether Congress provided an "unambiguous directive" defining the

[3] Section 1503 is all the more troubling because, under the interpretation urged by the Government, it authorized the President to divest the jurisdiction of Article III courts. It is well settled that Congress possesses plenary power to define the jurisdiction of the federal courts. *See Palmore v. United States*, 411 U.S. 389, 401 (1973) (quoting *Carv v. Curtis*, 44 U.S. 236, 244-45(1845) ("[T]he judicial power of the United States ... is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals .. . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good"). In recognition of that power, courts have been wary of authorizing the President to in any way curtail or interfere with that power. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 684-85 (1981) (Court upheld the Executive Order, noting that it did not improperly divest federal courts of jurisdiction, but rather suspended actions pending the exercise of jurisdiction by a claims tribunal; to the extent the actions fell outside the jurisdiction of the claims tribunal, they would be revived in U.S. courts).

temporal reach of a statute. *See Landgraf v. USI Film Products*. 511 U.S. 344, 263 (1994). In the absence of a clear statement from Congress, a court must next determine whether the normal rules of statutory construction "apply to remove even the possibility of retroactivity (as by rendering the statutory provision wholly inapplicable to a particular case)." *Lindh v. Murphy*. 521 U.S. 320, 326 (1997). If neither an express command by Congress to apply the statute retrospectively nor an intent to do so under normal rules of statutory construction is found, a court must next determine whether the statute at issue has a "retroactive effect." *Landgraf*, 511 U.S. at 280. If the answer to this question is "yes," a court should employ the strong presumption against applying that statute to pending cases absent "clear congressional intent favoring such a result." *Id*.

Applying this framework to the instant case, it is clear that § 1503 cannot be applied retrospectively to oust this Court of jurisdiction in this case.

As a preliminary matter, it cannot be disputed that § 1503 contains no "unambiguous directive" that the statute should be applied retrospectively to cases pending at the time of its enactment. Indeed § 1503 is completely silent as to the temporal reach of that legislation. Other than its argument that § 1503 is phrased in the present tense (U.S. at 9-10)—a claim that will be addressed in further detail, *infra*—the Government has not pointed to a single word or phrase in § 1503 that expressly mandates the retrospective application of that provision.

A. Normal Rules of Statutory Construction Preclude the Retrospective Application of § 1503

Given the absence of an express prescription directing the retrospective application of § 1503, the Court must next determine whether "normal rules of statutory construction" render the statute inapplicable to pre-enactment events.

The Government, for its part, insists that the wording of § 1503—authorizing the President to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism"—confers upon the President the power retroactively to restore Iraq's sovereign immunity and deprive this Court of its jurisdiction over pending cases against Iraq. (U.S. at 6). The Government fails to consider, however, that the language of § 1503 so essential to their position does not exist "in a vacuum." *Tyler v. Cain*, 533 U.S. 656, 662 (2001). Instead, this language appears in a proviso contained within a broader emergency appropriations measure whose purpose was to lift any barriers to aid and commerce with Iraq, both so essential to that country's rebuilding efforts. Given this context, were the Court to accept the Government's reading of § 1503, it would do so in direct contravention of four basic cannons of statutory construction.

1. Section 1503, Included As Part of an Appropriations Bill, Does Not Eliminate Plaintiffs' Statutory Right to Sue Iraq

One such rule of construction recognizes that the purpose of appropriations legislation is to

appropriate. Accordingly, there is a "very strong presumption" against interpreting appropriations legislation to "substantively change existing law." *Calloway v. District of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000) (*citing Building & Constr. Trades Dep't v. Martin*, 961 F.2d 269, 273 (D.C. Cir. 1992). Similarly, the "cardinal rule" disfavoring repeals by implication apply "with even greater force when the claimed repeal rests solely on an Appropriations Act." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189, 190 (1978).

Here, the proviso at issue in § 1503 appears in the EWSAA, a supplemental appropriations bill, within a chapter entitled "Bilateral Economic Assistance Funds Appropriated to the President." *See* 117 Stat. 559, 572. In light of the presumption against modifying or repealing existing law though appropriations measures, § 1503 cannot be interpreted, as the Government urges, to eviscerate Plaintiffs' vested right to sue Iraq in U.S. courts under § 1605(a)(7).

2. The Proviso At Issue in § 1503, When Construed in Light of § 1503 As a Whole, Does Not Remove Federal Jurisdiction Over Pending Cases Against Iraq

As noted above, the language of § 1503 upon which the Government's theory rests is a subordinate proviso. It is a well settled rule of construction that courts interpreting provisos must do so in the context of the entire legislative scheme. *See Schwartz v. Sacks*, 2 F.2d 188, 189 (D.C. Cir. 1924). Moreover, because the "grammatical and local scope [of a proviso] is confined to the principal clause," courts also must construe provisos in light of the principal clause and the purpose that it serves.

United States v. Morrow, 266 U.S. 531, 534-35 (1925) ("The general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality and prevent misinterpretation."). In doing so, courts must be mindful of this Circuit's admonition that provisos should never be interpreted to broaden the principal clause, but instead must be "strictly construed." *Way of Life Television Network v. FCC*. 593 F.2d 1356, 1359 (D.C. Cir. 1979).

Applying these rules of construction, it is manifest that the proviso at issue in § 1503 was never intended to deprive victims of Iraqi terrorism of their right to sue in U.S. courts. To the contrary, Congress enacted the EWSAA to provide badly needed assistance and relief to Iraq in the aftermath of the fall of Baghdad to coalition forces. This goal could not be achieved, however, unless the barriers to aid and commerce—imposed upon Iraq due to Saddam Hussein's support for international terrorism—were lifted. The sole focus of § 1503, including the proviso at issue here, is the removal of such barriers. Indeed, the principal clause of § 1503 authorized the President to "suspend the application of any provision of the Iraq Sanctions Act of 1990," thereby eliminating any obstacles to foreign assistance and private trade with Iraq.

The Iraq Sanctions Act of 1990[4] continued the embargo on trade and financial assistance to Iraq by calling for, among other things, full enforcement of § 620A of the Foreign Assistance Act of 1961,[5] which prohibits assistance to countries designated by the

[4] Pub. L. 101-513, 104 Stat. 1979.

[5] 22 U.S.C. § 2371 (a) & (b) (2000).

Secretary of State as supporters of terrorism. Once a nation has been designated a state supporter of terrorism, § 602A provides that the designation may not be rescinded (and financial assistance restored) absent certification, again by the Secretary of State, that the state at issue has new leadership, is not supporting acts of terrorism, and has pledged not to support terrorism in the future. *See* 22 U.S.C. § 2371(c)(1) (2000).

Significantly, in April 2003, when Congress enacted the EWSAA, such certification of Iraq was impossible for the simple reason that there was no established government in Iraq to certify. In the absence of this certification, Congress—in order to provide the urgently needed financial assistance to Iraq—had to authorize the President to make inapplicable to Iraq § 620A, along with any other obstacles to foreign trade premised on Iraq's designation as a state sponsor of terrorism. Congress enacted § 1503, including the proviso at issue here, precisely to achieve this limited purpose and not, as the Government suggests, to confer upon the President the power retroactively to remove jurisdiction over pending cases against Iraq.[6]

Indeed, in a letter dated March 25, 2003 (attached hereto at Tab A), the Director of the Office of Management and Budget confirmed that § 1503 "would repeal the Iraq Sanctions Act of 1990," and

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[6] The remaining provisos confirm that § 1503 was intended solely to facilitate foreign aid to, and trade with, Iraq. Several such provisos expressly lift restrictions on humanitarian assistance, financial and technical assistance, and trade. Still another terminates the President's authority under § 1503 on the earlier of September 30, 2004, or "the date of enactment of a subsequent Act authorizing assistance for Iraq . . . ."

"would also authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act." Sections 620G and 307, like § 602A, each require that aid be withheld from countries that support terrorism, and therefore had to be circumvented in order to provide aid to Iraq.

In sum, § 1503 was intended to remove impediments to aid and commerce with Iraq. The Government's reading of the proviso at issue here is plainly inconsistent with the overriding purpose of both EWSAA and § 1503, and thus should not be countenanced.

3. The "Any Other Provision of Law" Language in § 1503 Cannot Be Construed to Eliminate Federal Jurisdiction Over Plaintiffs' Claims

A third cannon of statutory construction implicated by the Government's interpretation of § 1503 provides that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Danny Keffeler*. 537 U.S. 371, 384 (2003) (citations omitted).

The Government contends that the "any other provision of law" language in the proviso of § 1503 authorizes the President to restore sovereign immunity for Iraq and eliminate federal jurisdiction over pending cases against that country. Yet this language is immediately preceded by the statement authorizing the President to make inapplicable to Iraq § 602A of the Foreign Assistance Act of 1961. Applying the rule of construction enunciated above,

the "any other provision" language so essential to the Government's position is necessarily limited by the nature of 620A. Put differently, this language is limited to provisions that, like 602A, would facilitate trade with and assistance to Iraq once made inapplicable to that country. Accordingly, the Government's interpretation of § 1503 cannot stand.

4. Section 1503 Does Not Nullify the Carefully Worded Temporal Provision of § 1605(a)(7)

Finally, the far-reaching interpretation of § 1503 urged by the Government flies in the face of a fourth rule of statutory construction, which holds that a narrow, precisely drawn statute will not be controlled or preempted by a general one absent a clear intention to do so. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 152 (1976) ("[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one . . .."); *see also United Ass'n of Journeymen & Apprentices v. Reno*, 73 F.3d 1134, 1140 (D.C, Cir. 1996) (same). As the Supreme Court has explained

> when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general matter, *and not expressly contradicting the original act*, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.

Radzanower v. Touche Ross & Co.. 426 U.S. at 152 (citations omitted) (emphasis added).

The specific, narrowly drawn statute at issue here is § 1605(a)(7), which permits certain suits against foreign nations if such nations were state sponsors of terrorism "at the time the act occurred." 28 U.S.C. § 1605(a)(7) (2000). Under the plain language of this section, the subsequent lifting of that nation's designation as a state sponsor of terrorism is of no import. Rather, a foreign nation will be subject to suit so long as it retained that designation at the time of the act in question.

Disregarding this clear language, the Government contends that the extraordinarily general "make inapplicable with respect to Iraq" language of § 1503 somehow negates the specific temporal scope of § 1605(a)(7). This simply cannot be, as there is nothing in the language of § 1503 to indicate that it was intended to "expressly contradict[]" the carefully worded timing provision of § 1605(a)(7). When Congress chooses to repeal or modify substantive legislation, it certainly knows how to do so; it need not "hide elephants in mouseholes." *Whitman v. American Trucking Ass'n.* 531 U.S. 457, 468 (2001).

B. The Interpretation of § 1503 Advanced By the Government Would Give § 1503 an Impermissible Retroactive Effect, One Not Clearly Intended By Congress

Inasmuch as the four canons of statutory construction set forth above preclude the reading of § 1503 advanced by the Government, this Court need not address the issue of § 1503 's temporal scope. *See Lindh*, 521 U.S. at 326. To the extent the Court does so, however, the only logical conclusion is that § 1503 cannot be applied retrospectively to oust this Court of jurisdiction over the instant case.

As the Supreme Court recognized in *Landgraf*. "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." 511 U.S. at 265. This presumption applies to any legislation that has a "retroactive effect," meaning that it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past. . . ." *Id.* at 269. The need for such a presumption is patent, as "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration." *Id.* at 266. For this reason, legislation that has an impermissible retroactive effect will not be applied retrospectively "unless Congress has clearly manifested its intent to the contrary." *Hughes Aircraft Co. v. United States*. 520 U.S. 939, 946 (1997).

The Government contends that (i) § 1503 has no impermissible retroactive effect because it is merely a jurisdiction-ousting statute, and (ii) even if § 1503 has a retroactive effect, Congress clearly expressed its intention that the statute apply to pending cases, thereby eliminating jurisdiction over the instant matter. Each of these arguments is wholly without merit.

1. Section 1503 Does Have an Impermissible Retroactive Effect

In *Hughes*, the Supreme Court articulated the circumstances in which the presumption against retroactivity should be applied to jurisdictional statutes. As the Court explained, "[s]tatutes merely addressing *which* court shall have jurisdiction to

entertain a particular cause of action" are not subject to the presumption against retroactivity because they simply regulate "*where* a suit may be brought." *Id.* at 951 (emphasis in original). On the other hand, the presumption does apply to statutes affecting "*whether* [a suit] may be brought at all" because such statutes "speak[] not just to the power of a particular court but to the substantive rights of the parties as well." *Id.* (emphasis in original). These latter statutes, the Court continued, "even though phrased in 'jurisdictional' terms, [are] as much subject to our presumption against retroactivity as any other." *Id.*

In an obvious misreading of *Hughes*, the Government first makes the broad-brush argument that the presumption against retroactivity is inapplicable because § 1503 is merely a jurisdiction-ousting statute to which that presumption does not pertain. (U.S. at 22). This claim is belied by no more than a cursory reading of *Hughes*, which, when considering the applicability of the presumption against retroactive legislation, made absolutely no distinction among statutes that confer jurisdiction and those that eliminate it.

Indeed, none of the cases the Government cites in support of its position address statutes like § 1503 that, when applied retrospectively, completely eliminated jurisdiction over a particular type of claim. (U.S. at 22-23). Rather, those statutes provided for alternative fora to determine the parties' rights and liabilities. *See Bruner v. United States*. 343 U.S. 112, 115, 116-17 (1952) (by requiring that actions by officers of the United States to recover salary and other compensation be submitted to the Court of Claims rather than district courts,

"Congress has not altered the nature or validity of petitioner's rights or the Government's liability but has simply reduced the number of tribunals authorized to hear and determine such rights and liabilities"); *Hallowell v. Commons*, 239 U.S. 506, 507-08 (1916) (transfer of authority to resolve Indian claims from courts to Secretary of the Interior); *Assessors v. Osbornes*, 76 U.S. 567, 572 (1869) (action for illegal assessment of taxes could be brought in state court); *Ex parte McCardle*, 74 U.S. 506, 514 (1868) (statute simply removed from the Supreme Court's appellate jurisdiction final decisions of the circuit courts); *Sherman v. Grinnell*. 123 U.S. 679, 680 (1887) (same).

Moreover, the Government's position finds no support among each of the federal courts of appeals to have considered this issue. In *Matthews v. Kidder, Peabody & Co., Inc.*, 161 F.3d 156 (3d Cir. 1998), the Third Circuit concluded that a statute that "[destroys] jurisdiction where [it] previously existed . . . speaks not just to the power of a particular court but to the substantive rights of the parties as well" and thus had an improper retroactive effect. *Id.* at 165-66 (citation omitted); *see also Scott v. Boos*, 215 F.3d 940 (9th Cir. 2000) (Ninth Circuit construed the same statute, and came to the same conclusion as to its retroactivity, as the Third Circuit in *Matthews*). More recently, in *Abrams v. Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173 (2d Cir. 2003), the Second Circuit, rejecting defendants' claims that the presumption against retroactivity applies only to jurisdiction-creating statutes, held that the FSIA's application to that case was impermissibly retroactive because it "fully barred

claims that previously could have been adjudicated in the United States." *Id.* at 186.

Next, the Government makes the equally baseless claim that the presumption against retroactivity is *per se* inapplicable to legislation that, like § 1503, touches upon the foreign policy interests of the United States. (U.S. at 13-14, 16-17). Relying on *The Schooner Peggy*. 5 U.S. 103 (1801), the Government argues that in the foreign affairs context, courts should give immediate effect to new legislation regardless of their retroactive effect. (U.S. at 13). The Government ignores, however, that the *Landgraf* Court made clear that the Supreme Court's "application of' the law in effect' at the time of [its] decision in *Schooner Peggy* was simply a response to the language of the statute," which "*unambiguously* provided for the restoration" of a French vessel that had been seized in American waters, but had not yet been "definitively condemned." *Landgraf*, 511 U.S. at 273 (emphasis added).

The Government also fails to consider that courts have routinely applied the presumption against retroactivity in cases involving foreign affairs. In fact, the D.C. Circuit did so just last year in the case of *Hwang Geum Joo v. Japan*, 332 F.3d 679, 682-86 (D.C. Cir. 2003), in which the Court concluded that the FSIA does not apply retroactively to events occurring before 1952, when the United States adopted a restrictive theory of sovereign immunity. Still other courts also have applied the framework set out in *Landgraf/Lindh* to the FSIA (*see, e.g., Abrams v. Societe Nationale des Chemins de Fer Francais*. 332 F.3d at 186-87; *Jackson v. People's Republic of China*, 794 F.2d 1490, 1497-98 (11th Cir. 1986); *Ministry of Defense & Support for the Armed Forces of*

the Islamic Republic of Iran v. Cubic Defense Svs., 236 F. Supp. 2d 1140, 1145 n.2 (S.D. Cal. 2002)), and to statutes that address foreign affairs generally. *See, e.g., Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116, 128-29 (2d Cir. 2000); *Cernuda v. Heavey*, 720 F. Supp. 1544, 1553 (S.D. Fla. 1989).

Implicitly recognizing the folly of its arguments, the Government next contends that the presumption against retroactive legislation is inapplicable to § 1503 because although, in its view, § 1503 would eliminate all Plaintiffs' right to seek redress from judicial tribunals, Plaintiffs would still be left with alternative fora to determine the parties' rights and liabilities. (U.S. at 23). Although the Government in this case has failed to elucidate exactly what that alternative forum might be, in *Acree v. Republic of Iraq*, currently pending before the D.C. Circuit, the Government has explained that Plaintiffs' claims may be resolved through "espousal" by the Executive Branch.[7]

To be sure, this Circuit has held that a statute which "takes away jurisdiction from the federal courts and vests exclusive authority in an executive agency to resolve certain disputes [is] considered a 'jurisdictional rule, that simply changes the tribunal that is to hear the case." *LaFontant v. INS*, 135 F.3d 158, 162 (D.C. Cir. 1998). However, "espousal"—far from the "tribunal" contemplated by *Landgraf*, *Hughes* and their progeny - is merely a discretionary remedy subject to the whim of the Executive Branch, and therefore cannot save § 1503 from the presumption against retroactivity.

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[7] Oral argument in *Acree* took place on April 7, 2004.

In international law, "espousal" describes the mechanism whereby one government adopts or "espouses" and settles the claim of its nationals against another government. *See generally Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1522-23 (D.C. Cir. 1984). Significantly, however, the decision of whether to "espouse" such claims lies solely within the President's discretion. There is no guarantee that the President will do so, nor is there any guarantee that the foreign nation at issue will agree. And, as the Government itself has conceded in *Acree*. unlike a judicial or traditional administrative tribunal, "espousal" provides no guarantees of process or even a fundamental consideration of the rule of law.[8] Plainly, then, under the reading advanced the by the Government, section 1503 would not simply transfer to another tribunal the power to determine Plaintiffs' claims. To the contrary, if applied retrospectively, § 1503 would effectively eliminate Plaintiffs' right of redress for the severe damage

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[8] In its brief in *Acree*, the Government noted that "[t]o be sure, the form of such espousal may remain unclear at this juncture." (U.S. Acree at 44). Accordingly, the narrow prospect of "espousal" cannot be equated with the agency fora approved by courts in other jurisdiction-ousting cases. For example, in *LaFontant*, although Congress eliminated judicial review of deportation orders, it vested full, non-discretionary authority to issue such orders with an Immigration Judge at the Bureau of Immigration Affairs. *See LaFontant v. INS*. 135 F.3d at 164-65. And in *Hallowell*. although the statute removed federal courts' jurisdiction over issues of intestacy among Native Americans, it provided that the "Secretary of Interior upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent." Act of June 25, 1910, 36 Stat. 855, ch. 431 (1910). *See Hallowell v. Commons*, 239 U.S. at 508.

inflicted by the Republic of Iraq, a result this Court must not sanction.

Finally, the Government suggests that the presumption against retroactivity is not applicable to § 1503 because Plaintiffs have no settled expectations as to their ability to litigate their actions in U.S. courts under § 1605(a)(7). (U.S. at 15-16). This argument ignores the D.C. Circuit's recent decision in *Hwang Geum Joo*, which recognized the "settled expectations" of foreign nations with respect to their immunity from suit in U. S. courts even though our foreign policy interests might later change. See 332 F.3d at 684. It is incongruous to suggest that Plaintiffs, as citizens of this country, are not entitled to a similar "settled expectation" as to their ability to seek redress in U.S. courts for the suffering inflicted by Iraq.

Indeed, § 1605(a)(7) expressly provides that jurisdiction over suits against a foreign state is based upon that state's designation as a sponsor of terrorism "at the time the act occurred." The significance of this temporal phrase is two-fold. First, it was plainly intended to preserve the jurisdiction of U.S. courts for claims involving, *inter alia*, hostage-taking and torture in the event the United States later decertified the foreign nation as a state sponsor of terrorism. Second, § 1605(a)(7) abrogated the immunity of foreign states for acts of hostage-taking and torture committed before the enactment of the Flatow amendment in 1996 so long as those states were designated as terrorist nations at the time the act occurred. Thus, contrary to the Government's claims, it is immaterial that nations like Iraq possessed sovereign immunity at the time of the conduct at

issue. (U.S. at 15). As the Government acknowledges, Iraq was designated a state sponsor of terrorism in 1990. (U.S. at 4 n.2). Thus, from 1996 forward, Plaintiffs in this case, as well as plaintiffs generally, had a "settled expectation" that they could prosecute their claims against Iraq, without regard to the sovereign immunity, so long as that conduct occurred after 1990.

The Government further seeks to defeat Plaintiffs' "settled expectations" by pointing out that the President had the authority to preclude or settle Plaintiffs' claims by executive agreement. (U.S. at 13-14). This fact is of no import, however, because, as a technical matter, the political branches have the power to abolish any cause of action at any time. Thus, the notion that Congress and the Executive Branch could theoretically compromise the claims of these Plaintiffs or any others is simply not sufficient to defeat Plaintiffs' "settled expectation" that their claims maybe heard in U.S. courts.

2. Congress Never Clearly Expressed an Intent to Apply § 1503 Retroactively

Given the retroactive effect of § 1503, this Court must next determine whether Congress manifested an intent to apply this legislation retrospectively. As the Supreme Court has stated, "[t]he standard for finding such unambiguous [Congressional] direction is a demanding one." *INS v. St. Cyr*, 533 U.S. 289, 316 (2001). Indeed, the Court has only found such intent in cases involving legislation with "statutory language that was *so clear that it could sustain only one interpretation*." *Lindh*, 521 U.S. at 329 n.4 (emphasis added). Applying this rigorous standard, the Government has not, and indeed cannot,

demonstrate clear Congressional intent to apply § 1503 retrospectively.

The Government submits that the language of § 1503, phrased using both the present tense and present perfect tense, was "plainly" intended to authorize the President to restore retrospectively Iraq's sovereign immunity for conduct occurring, and actions filed, before the statute was passed. (U.S. at 9-10). But the language on which the Government's theory rests—"make inapplicable" and "countries that have supported terrorism"—does not unambiguously communicate Congress' intent to apply this section to all cases pending at the time of its enactment. To the contrary, this language is equally consistent with an intention to make inapplicable § 1605(a)(7)'s state-sponsored terrorism exception where the conduct occurred or action filed *after* the legislation became effective.[9]

Moreover, it strains credulity to suggest that Congress—well aware of its obligation to express clearly its intent to apply a statute retrospectively—would rely upon nothing more than grammatical nuance in order to manifest such intent. To the contrary, when Congress chooses to legislate

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[9] The Government also points to *subsequent* legislation, executive orders and a United Nations Security Council Resolution as further "proof of Congress" intent to apply § 1503 retrospectively. (U.S. at 11-12). The Government's reliance on these enactments is misplaced. For one, the subsequent legislation cited by the Government (Pub. L. No. 108-106, 117 Stat. 1209) was nothing more than an appropriations bill; it was silent as to the jurisdiction of U.S. courts over actions against Iraq. And as for the executive orders and U.N. Security Council Resolution, it is anomalous to suggest that such later-enacted policy statements—not promulgated by Congress—could have any bearing on Congress' intent in enacting prior legislation.

retrospectively, it certainly knows express its intent in clear, unequivocal terms. For example, in enacting § 1605—including the state sponsored terrorism exception to sovereign immunity—Congress expressly provided that the legislation "shall apply to any cause of action arising before, on, or after the date of the enactment of this Act." 28 U.S.C. § 1605 (historical and statutory notes). See also *Reno v. American Anti-Discrimination Comm.*, 525 U.S. 471, 477 (1999) (provision removing jurisdiction to review deportation orders applied "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings").

In the end, there is simply no evidence of the clear Congressional intent required to overcome the presumptively improper retroactive effect that would result from applying § 1503 to pending cases.

III. Plaintiffs Have Established a Viable Cause of Action Against Iraq By Operation of § 1606 of the FSIA

Citing the D.C. Circuit's recent decision in *Cicippio-Puleo v. Islamic Republic of Iraq*. 353 F.3d 1024 (2004), the Government contends that Plaintiffs' Complaint must be dismissed because it appears to rest solely on § 1605(a)(7). (U.S. at 28). The Government pays short shrift to this argument, and with good reason, as Plaintiffs' Complaint is grounded not on § 1605(a)(7), but on § 1606. That section, in turn, provides that non-immune terrorist states are liable for their misdeeds to the same extent as private individuals, and that any cause of action that could be brought against such individuals is likewise available against a terrorist state. Here, Plaintiffs' Complaint properly asserts a clause of

action for the tort of intentional infliction of emotional distress. There is nothing in the D.C. Circuit's decision in *Cicippio-Puleo* that protects terrorist states from such liability. Accordingly, the Government's argument must be rejected.

In *Cicippio-Puleo*, the children and sibling of Joseph Cicippio, an American citizen held hostage and tortured by an Iranian supported terrorist organization, sued Iran "based on claims purporting to arise under section 1605(a)(7) and the Flatow Amendment." 353 F.3d at 1027, 1028. Affirming the dismissal of plaintiffs' claims, the D.C. Circuit held that neither § 1605(a)(7) nor the Flatow Amendment—"the only provisions upon which plaintiffs rely"—"establishes a cause of action against foreign state sponsors of terrorism." *Id.* at 1033, 1027. Accordingly, the Court concluded that the plaintiffs could not "proceed on these grounds." *Id.* at 1027.

Significantly, however, the Court did not foreclose the possibility that "an alternative source of law" could support a cause of action against non-immune terrorist states. *Id.* at 1036. To the contrary, the Court found that § 1605(a)(7) "make[s] it clear that designated foreign state sponsors of terrorism *will be amenable* to suits in United States courts for acts of terrorism *in cases in which there is a viable cause of action*." *Id.* (emphasis added). The Court therefore remanded the case, allowing the plaintiffs an opportunity to amend their complaint to assert causes of action under "some other source of law, including state law."[10] *Id.*

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[10] The D.C. Circuit's remand was in keeping with the decisions of other courts of this District, which recognize the right of plaintiffs to pursue tort claims, including the claim of intentional infliction of

Applied to the instant case, *Cicippio-Puleo* does not require dismissal of Plaintiffs' Complaint because it is premised not upon § 1605(a)(7) of the FSIA, but on § 1606.[11] Section 1606 provides, in relevant part, that "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the *foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances*." 28 U.S.C. § 1606 (emphasis added). Use of the words "shall be liable" in § 1606 was clearly intended to create a cause of action.[12] As to the scope of that cause of action, § 1606 requires that terrorist states will be liable in the same manner and to the same extent as a private individual, whether under federal, state, or foreign law. *See First Nat'l City Bank v. Banco Para El*

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emotional distress, against non-immune terrorist states. *See, e.g., Dammarell v. Islamic Republic of* Iran, 281 F. Supp. 2d 105, 194 (D.D.C. 2003); *Kilburn v. Republic of Iran*, 277 F. Supp. 2d 24, 36 (D.D.C. 2003); *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 35 (D.D.C. 2001), *aff'd Bettis v. Islamic Republic of Iran*, 315 F.3d 325 (D.C. Cir. 2003); *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27,44, 47 (D.D.C. 2001); *Anderson v. Islamic Republic of Iraq*. 90 F. Supp. 2d 107, 113 (D.D.C. 2000).

[11] The issue of whether viable causes of action may be asserted against a non-immune state sponsor of terrorism under § 1606 is currently before the D.C. Circuit in *Kilburn v. Islamic Republic of Iran* (No. 03-7117). Oral argument is currently scheduled for May 14, 2004.

[12] *See Key Tronic Corp. v. United States*, 511 U.S. 809, 822 (1994) (Scalia, J., dissenting) ("to say that A shall be liable to B is the *express* creation of a right of action) (emphasis in original); *American Council of certified Podiatric Physicians & Surgeons v. American Bd. of Podiatric Surgery, Inc.* 185 F.3d 606, 613 (6th Cir. 1999) ("shall be liable" creates cause of action); *Underwood v. Wilson*, 151 F.3d 292, 294 (5th Cir. 1998) (same).

Comercio Exterior de Cuba, 462 U.S. 611, 622 n. 11 (1983) (where, for example, "state law provides a rule of liability governing private individuals, [§ 1606 of] the FSIA *requires* the application of that rule to foreign states in like circumstances") (emphasis added). In so doing, § 1606 in effect "instructs federal judges to find the relevant law, not to make it." *Bettis v. Islamic Republic of Iran*, 315 F.3d at 333; *see also Kilburn v. Republic of Iran*, 277 F. Supp. 2d at 36 (same).

In the instant matter, given the various jurisdictions that might claim an interest in this case, the search for the "relevant law" entails a choice-of-law analysis, applying ordinary choice-of-law principles, as to whether foreign law (here, the law of Iraq) or U.S. law applies. This issue is easily resolved because Iraq has yet to appear in this action, nor has any authority been presented as to the substance of Iraqi law. Under the Restatement (Second) of Conflicts, "where either no information, or else insufficient information, has been obtained about the foreign law, the forum will usually decide the case in accordance with its own local law...." Restatement (Second) of Conflicts § 136 cmt. h (2003); *see Banque Libanaise Pour Le Commerce v. Khreich*. 915 F.2d 1000, 1006 (5th Cir. 1990) ("absent sufficient proof to establish with reasonable certainty the substance of the foreign principles of law, the district court should apply the law of the forum").

But even if Iraq had appeared and presented proof that its law fails to recognize Plaintiffs' emotional distress claims, it would be of no import because the United States has the greatest interest in seeing its laws applied. The Restatement (Second) of Conflicts, whose approach is followed by courts of

this District,[13] requires courts to apply the law of the jurisdiction with "the most significant relationship to the occurrence . . . ." Restatement (Second) of Conflicts § 145. Plainly, under the standard set forth in the Restatement, the jurisdiction with the most significant relationship to the events at issue in this case is the United States.

As a general matter, courts of this District—recognizing that the FSIA was enacted for the purpose of creating a judicial forum through which American victims of foreign terrorism may be compensated (*see Price v. Socialist People's Libyan Arab Jamahiriya*. 294 F.3d 82,88-89 (D.C. Cir. 2002))—consistently have held that in cases against state sponsors of terrorism, the United States has a far greater interest in the application of its laws than does any other jurisdiction. *See, e.g.. Flatow. Islamic Republic of Iran*, 999 F. Supp. at 14. Moreover, the interest of the United States is even more compelling in this case given that the acts of hostage-taking and torture underlying Plaintiffs' emotional distress claims were specifically directed at American citizens in order to exact concessions from the United States government or to obtain humanitarian aid. *See, e.g.*, Complaint ¶ 6. Accordingly, application of U.S. law is warranted in this case.

Applying U.S. law, it is well settled that the tort of intentional infliction of emotional distress is universally accepted under principles of common law. In defining the scope or elements of this tort,

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[13] *See, e.g., Wagner v. Islamic Republic of Iran*. 172 F. Supp. 2d 128, 134 (D.D.C. 2001): *Flatow v. Islamic Republic of Iran*. 999 F. Supp. 1, 14 (D.D.C. 1998).

"federal courts in FSIA . . . cases have accepted § 46 of the Restatement (Second) of Torts as a proxy for state common law of intentional infliction of emotional distress." *Bettis v. Islamic Republic of Iran*. 315 F.3d at 333.

Significantly, in cases brought by immediate family members of victims of terrorism or hostage-taking under the FSIA, courts of this District have concluded that "the plaintiff need not be present at the place of outrageous conduct." The physical presence requirement is relaxed to include awareness of the fact that the family member has been abducted and held hostage. It does not require physical presence at the prison where the hostages were held. *See Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 271 (D.D.C. 2003); *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d at 36; *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d at 49-50. Accordingly, because U.S. law provides the rule of decision in this case, that law provides Plaintiffs with an actionable common law claim for intentional infliction of emotional distress.

CONCLUSION

For the reasons set forth herein, the Government's suggestion that the EWSAA deprives this Court of jurisdiction over this action, or that Plaintiffs' Complaint fails to state a viable cause of action against Iraq, must be rejected.

Dated April 15, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was sent on this 14th day of April, 2004, via facsimile and U.S. Mail to Andrew S. Tannenbaum, Trial Attorney, U.S. Department of Justice, Civil Division, P.O. Box 883, 20 Massachusetts Ave., NW, Washington, D.C. 20044.

Andrew C. Hall, Esq.

APPENDIX M

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ROBIN BEATY, *et al.*, Plaintiffs, v. REPUBLIC OF IRAQ, Defendant.	Civil Action No. 03-0215 (JDB)

UNITED STATES' REPLY IN SUPPORT OF ITS STATEMENT OF INTEREST

* * * * *

INTRODUCTION

In May 2003, the President made Section 1605(a)(7) of the Foreign Sovereign Immunities Act ("FSIA") inapplicable to Iraq, thereby restoring Iraq's sovereign immunity from this action. Pursuant to the Court's invitation, the United States filed a Statement of Interest demonstrating the lack of prospective subject-matter jurisdiction in this matter, as well as the crucial foreign policy goals underlying the President's determination and the Emergency Wartime Supplemental Appropriations Act of 2003 ("EWSAA"), Pub. L. No. 108-11, § 1503,

the statute that authorized it. *See* Statement of Interest of the United States ("U.S. St.").

In response, plaintiffs argue that Section 1503 of the EWSAA violates the Presentment Clause by authorizing the President to repeal Section 1605(a)(7) of the FSIA. *See* Plaintiffs' Response to Statement of Interest of the United States ("Pl. Br.") at 3-6. Plaintiffs further contend that Section 1503 is inapplicable to this case as a matter of statutory construction, *see id.* at 7-12, and that even if Section 1503 does apply, the restoration of Iraq's sovereign immunity from this action would be impermissibly retroactive, *see id.* at 13-20.

Plaintiffs' contentions are without merit. Section 1503 does not allow the President to repeal or amend legislation, but rather constitutionally authorizes the President to waive a narrow set of laws as they apply to Iraq. Moreover, plaintiffs' claim that Section 1503 does not apply as a matter of construction is directly contrary to the statute's plain text, which clearly authorizes the President to make Section 1605(a)(7) immediately inapplicable to Iraq. Indeed, the Supreme Court has repeatedly applied similar jurisdictional-ousting statutes to pending cases in the absence of express language to the contrary. Furthermore, the restoration of Iraq's sovereign immunity is prospective, not retroactive, in effect, and, in any event, a presumption against retroactivity cannot apply where it would frustrate important foreign policy determinations of the political branches. Accordingly, the Court should give immediate and full effect to the President's determination to restore Iraq's sovereign immunity from pending Section 1605(a)(7) claims, and

consequently dismiss this case for lack of subject-matter jurisdiction.

ARGUMENT

I. SECTION 1503 DOES NOT VIOLATE THE PRESENTMENT CLAUSE

Plaintiffs argue that Section 1503 of the EWSAA improperly delegates legislative power by authorizing the President to repeal legislation. *See* Pl. Br. at 3-6. Specifically, plaintiffs claim that the effect of Presidential Determination No. 2003-23 was to repeal Section 1605(a)(7) "as it applies to Iraq," in violation of the Presentment Clause. Pl. Br. at 3. Plaintiffs' argument is unavailing. Rather than allowing the President to repeal statutes, Section 1503 authorizes the President to make inapplicable a limited number of statutes (those that "apply to countries that have supported terrorism") in a limited range of circumstances (insofar as they apply "with respect to Iraq"), and in an area where he enjoys independent constitutional authority. The statutes made inapplicable, such as Section 1605(a)(7), remain valid law and are fully applicable to all other designated state sponsors of terrorism. *See* 15 C.F.R. § 750.4(b)(6)(i) (listing seven countries as state sponsors of terrorism).

Section 1503, therefore, has no resemblance, in either form or effect, to the line item veto power at issue in *Clinton v. City of New York*, 524 U.S. 417 (1998). Rather, it is akin to a wide range of statutes that allow the President, in the area of foreign affairs, to waive, suspend, or make inapplicable, various provisions of law. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 322-28 & n.2 (1936) (canvassing laws, contained in

"[p]ractically every volume of the United States Statutes," leaving the conduct of foreign affairs to the judgment of the President); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374, 375 (2000) (discussing provision that allowed the President to "respond to change by suspending sanctions [against Burma] in the interest of national security"); 22 U.S.C. § 7207(a)(3) (President may waive prohibition on assistance for commercial exports to Iran, Libya, North Korea, or Sudan "to the degree the President determines that it is in the national security interest of the United States to do so, or for humanitarian reasons"); *cf.*, *e.g.*, 42 U.S.C. § 7545(k)(2)(B) (EPA may waive, in a limited geographical area, requirement regarding oxygen content of gasoline).

The crux of plaintiffs' argument is that Section 1503 does not meet what plaintiffs claim are three independent requirements, established by *Clinton*, for a permissible delegation of power to the President: the delegation must depend on a condition not existing at the time of its enactment; the President must be required to act upon the condition's occurrence; and the President must be implementing congressional policy. *See* Pl. Br. at 5. As already explained, *Clinton* is inapplicable because Section 1503 does not grant the President the power to repeal or amend statutes. In any event, the Supreme Court did not hold or even suggest that the three considerations relied upon by plaintiffs constitute any sort of generally applicable test necessary to sustain all delegations of power to the President. Rather, the Court simply held them sufficient to distinguish the Line Item Veto Act struck down in Clinton from the delegation upheld in

Field v. Clark, 143 U.S. 649 (1892). *See Clinton*, 524 U.S. at 443-44.

Moreover, whatever *Clinton* might have held with respect to domestic affairs, it expressly distinguished statutes relating to foreign policy and recognized that "in the foreign affairs arena, the President has 'a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.'" 524 U.S. at 445 (quoting *Curtiss-Wright*, 299 U.S. at 320). *Clinton* thus reaffirmed the long-standing principle that Congress may authorize the President to act "in respect of subjects affecting foreign relations, [by] either leav[ing] the exercise of the power to his *unrestricted* judgment, or provid[ing] a standard far more general than that which has always been considered requisite with regard to domestic affairs." *Curtiss-Wright*, 299 U.S. at 324 (emphasis added); *see also Loving v. United States*, 517 U.S. 748, 772 (1996) (holding that "the same limitations on delegation do not apply where the entity exercising the delegated authority itself possesses independent authority over the subject matter") (internal quotation marks omitted). Accordingly, the Supreme Court has never held unconstitutional a delegation of foreign affairs power to the President, and it has acknowledged the "unwisdom" of attempts to restrict the President's discretion in foreign affairs, because it is the President, "not Congress, [who] has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war." *Curtiss-Wright*, 299 U.S. at 321, 320; *accord Clinton*, 524 U.S. at 445. Section 1503 is plainly constitutional under these well-established principles. *See Smith v. Fed. Reserve Bank of N.Y.*,

280 F. Supp. 2d 314, 323-24 (S.D.N.Y.) (upholding Section 1503 as constitutional under the Presentment Clause), *aff'd on other grounds*, 346 F.3d 264 (2d Cir. 2003).

Plaintiffs' constitutional challenge is particularly misguided because Section 1503, insofar as it applies to 28 U.S.C. § 1605(a)(7), simply grants the President (with respect to Iraq alone) a specific power that the Executive Branch had exercised for nearly two centuries, without any delegation from Congress and without even a hint of constitutional difficulty. *See* U.S. St. at 7-8. Prior to the FSIA's enactment in 1976, the Executive Branch determined whether foreign sovereigns should be accorded immunity from suit on a case-by-case basis, and the courts were bound to accept those determinations and "surrender [their] jurisdiction." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945); *accord Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486-88 (1983). Section 1503 is entirely consistent with that traditional Executive Branch power.[1] Moreover, even under current law, suits can be brought pursuant to Section 1605(a)(7) only on the basis of an Executive Branch designation of the particular foreign state as a sponsor of terrorism. It therefore followed naturally that, in light of intervening foreign policy

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[1] The longstanding pedigree of the Executive Branch's authority over foreign sovereign immunity also refutes plaintiffs' claim, *see* Pl. Br. at 5 n.3, that Section 1503 impermissibly interferes with the power of Congress to define federal court jurisdiction. Prior to the enactment of the FSIA, courts "consistently . . . deferred" to the foreign sovereign immunity determinations of the Executive Branch. *Verlinden*, 461 U.S. at 486. There is no constitutional impediment for Congress to restore, with respect to Iraq, this traditional Executive Branch power.

developments, Congress would authorize the President to render inapplicable a statute that applied to Iraq in the first instance only by virtue of an Executive Branch determination.[2]

II. SECTION 1503 PROSPECTIVELY AND IMMEDIATELY RESTORES IRAQ'S SOVEREIGN IMMUNITY FROM PENDING TERRORISM-RELATED CLAIMS

Plaintiffs argue that Section 1503 could not have authorized the President "retrospectively to oust this Court of jurisdiction in this case." Pl. Br. at 6. To support this claim, plaintiffs first rely on several canons of statutory construction, which they contend render Section 1503 wholly inapplicable to this matter. *See* Pl. Br. at 6-12. Plaintiffs further argue that even if Section 1503 were applicable, the restoration of Iraq's immunity from this case would have an impermissible retroactive effect in the absence of a clear statement that Congress intended such a result. *See* Pl. Br. at 13-20.

Plaintiffs' arguments are without merit. In invoking various canons of construction, plaintiffs inject their own understanding of the statutory purpose of Section 1503 while ignoring the otherwise plain text. There can be no question that Section 1605(a)(7) of the FSIA is a "provision of law that applies to countries that have supported terrorism,"

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[2] Indeed, the fact that the President effectuated a policy choice authorized by Congress in Section 1503 is yet another factor that distinguishes this case from *Clinton*, where the President and Congress were at odds with respect to the provision as to which the President exercised the veto. *See Smith*, 280 F. Supp. 2d at 324 ("Unlike in *Clinton*, President Bush is carrying out, not rejecting a policy made by Congress based on the drastically changed circumstances in Iraq.").

and thus squarely within the set of statutes that Congress unambiguously authorized the President to make immediately inapplicable to Iraq. *See* U.S. St. at 8-9. Moreover, plaintiffs' entire argument is based on the faulty premise that Section 1503 applies retrospectively to this action. It does not. Rather, it applies *prospectively* to restore immediately Iraq's immunity from the date of the Presidential Determination, thereby ousting the Court of further jurisdiction over plaintiffs' claims. *See* U.S. St. at 9-12. Because the restoration of Iraq's sovereign immunity does not have retroactive effect, a clear statement rule does not apply. Such a rule, in any event, would contravene established Supreme Court precedent by interfering with the ability of the President to conduct foreign policy. *See* U.S. St. at 13-18.

A. By its Plain Language, Section 1503 Authorized the President to Make Section 1605(a)(7) Immediately Inapplicable to Iraq

Plaintiffs invoke four canons of statutory construction which they claim wholly preclude the application of Section 1503 to this case. But Section 1503's application is clear. By its plain language, Section 1503 authorized the President to "make inapplicable with respect to Iraq . . . any . . . provision of law that applies to countries that have supported terrorism." Use of the word "any" signifies breadth, *see United States v. Monsanto*, 491 U.S. 600, 609 (1989), and Section 1605(a)(7) of the FSIA, which abrogates foreign sovereign immunity for certain claims against countries designated by the Secretary of State as state sponsors of terrorism, is unquestionably "a provision of law that applies to countries that have supported terrorism." *See* U.S.

St. at 8-9. Also clear is Section 1503's application to plaintiffs' pending claims. As previously discussed, statutes that oust jurisdiction require the immediate dismissal of pending cases, absent an express reservation to the contrary. *See* U.S. St. at 22-25.

Plaintiffs' proposed construction of Section 1503 thus finds no support in the text, purposes or context of that provision, in the understanding of that provision embraced by the President, or even in the host of canons that they erroneously invoke. Indeed, plaintiffs have ignored what the Supreme Court has called the "cardinal" canon: "[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *accord Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998) (where statutory meaning was clear, there was "no reason . . . even to resort to the canons of construction that we use to resolve doubtful cases").

Plaintiffs first claim that there is a "very strong presumption" against interpreting appropriations legislation to "substantively change existing law." Pl. Br. at 8. But Section 1503 is not itself an appropriations rider or funding limitation; it says nothing about the appropriation or expenditure of federal funds. Instead, it expressly authorizes the President to make defined statutes "inapplicable with respect to Iraq." Moreover, various other provisions of the EWSAA unquestionably do "substantively change existing law." *See, e.g.*,

EWSAA § 2105, 117 Stat. at 589 (amending 7 U.S.C. § 6506 to allow labeling of wild seafood as "organic"); EWSAA § 2503, 117 Stat. at 599 (amending 20 U.S.C. § 6537(3) to change definition of "low-income individual"). Section 1503 is thus entirely unlike the provisions considered in such cases as *Building & Construction Trades Department AFL-CIO v. Martin*, 961 F.2d 269, 273 (D.C. Cir. 1992), and *Calloway v. District of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000), where the D.C. Circuit, addressing appropriations riders that restricted the expenditure of funds in conjunction with particular programs, declined to construe such restrictions as implicitly repealing the entire underlying program.

In any event, appropriations statutes "can substantively change existing law," *Bldg. & Constr. Trades Dep't*, 961 F.2d at 273, and whether they do so is a straightforward question of statutory interpretation. As explained by the General Accounting Office—"whose accumulated experience and expertise in the field of government appropriations gives special weight to its opinions," *Int'l Union v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) (citation omitted)—courts should discount "the occasional sweeping statement such as 'appropriations acts cannot change existing law.' Such statements can be misleading, and should be read in the context of the facts of the particular case." 1 GAO, *Principles of Federal Appropriations Law*, 2-56 (2d ed. 1991). Here, Section 1503 gave specific and clear authority to the President to make certain statutes inapplicable to Iraq, and that express provision should be given its full and natural effect.

Relying on a second so-called canon of construction, plaintiffs next attempt to characterize the operative language of Section 1503 as a mere "subordinate proviso." Pl. Br. at 8. Plaintiffs essentially contend that, because the words "Provided that" introduce the clause authorizing the President to make certain statutes inapplicable to Iraq, the scope of that authority is restricted by the antecedent clause authorizing the President to "suspend the application of any provision of the Iraq Sanctions Act of 1990." Thus, under plaintiffs' restrictive reading, the "sole focus" of Section 1503 as a whole, including the clause at issue here, is the removal of barriers to aid and commerce imposed on the regime of Saddam Hussein. Pl. Br. at 9.

Plaintiffs' own authority, however, refutes the premise that a proviso is necessarily restrictive. In *United States v. Morrow*, 266 U.S. 531 (1925), the Supreme Court did not state any general rule of law; instead, the Court relied on "the plain meaning" of the proviso at issue. *Id.* at 534. Moreover, *Morrow* itself made clear that a clause appearing to be a proviso is "sometimes used to introduce independent legislation," and that courts must look to the "entire context" of the statute to determine whether it is used for that purpose. *Id.* at 535; *see also* 2A Norman J. Singer, *Sutherland's Statutes & Statutory Construction*, § 47:08, at 235-36 (6th ed. 2000) (provisos "are construed using the same general criteria of decision applied to other kinds of provisions").

By its plain text, the clause at issue here authorizes the President to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or *any other provision of law*

that applies to countries that have supported terrorism" (emphasis added). If Congress wanted to limit that broad language to specific statutes dealing only with aid or trade, it could have done so explicitly.[3] Moreover, that clause—which plaintiffs mischaracterize as a restrictive "proviso"—necessarily operates independently of the authority granted in the introductory clause to "suspend the application of any provision of the Iraq Sanctions Act of 1990." Pub. L. No. 108-11, § 1503. The Foreign Assistance Act prohibits aid to countries determined by the Secretary of State to support international terrorism. *See* 22 U.S.C. § 2371(a). The Iraq Sanctions Act, passed nearly two months after the Secretary of State designated Iraq as a state sponsor of terrorism for purposes of the Foreign Assistance Act, *see* 55 Fed. Reg. 37793 (Sept. 13, 1990), independently imposed new sanctions on Iraq and required the complete enforcement against Iraq of specified statutes, including but not limited to the Foreign Assistance Act. *See* Pub. L. No. 101-513 § 586F(c)(1). The independent nature of the authorities granted in the two separate clauses is thus plain; for example, if application of the Iraq Sanctions Act alone had been suspended, the Foreign Assistance Act and other relevant provisions would still have remained in force against Iraq. The separate clauses,

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[3] For the same reason, the March 25, 2003 letter from the OMB Director, *see* Pl. Br. at 10, does not support plaintiffs' restrictive construction. If Congress wanted to limit Section 1503's applicability to the statutes listed in the letter—which did not purport to be an exhaustive list, but simply cited examples of provisions that may be made inapplicable—it could have done so. Instead, it provided a much broader authorization, and that clear text controls.

therefore, must be given the substantive effect required by their plain meaning.

Furthermore, the Iraq Sanctions Act itself is not limited to restrictions on aid and trade. Indeed, the statute requires the enforcement of "*all other provisions of law* that impose sanctions against a country which has repeatedly provided support for acts of international terrorism." *Id.* (emphasis added). Federal law imposes a wide range of adverse legal consequences on such countries, including restrictions on government contracts, individual grants and fellowships, and foreign tax credits, *see, e.g.*, 10 U.S.C. § 2249a(a)(1)-(2); *id.* § 2327(b); 15 U.S.C. § 7410(b); 22 U.S.C. § 2780(a)(2); *id.* § 2780(a)(1); 26 U.S.C. § 901(j)(2)(iv), 50 U.S.C. app. § 2405, as well as increased exposure to judgments, 28 U.S.C. § 1605(a)(7), and execution or attachment, *id.* § 1610; Pub. L. No. 107-297, § 201, 116 Stat. 2322. Section 1605(a)(7) thus clearly falls within the broad category of sanctions addressed by the Iraq Sanctions Act. Indeed, two district courts have already held that Section 1503 authorized the President to make inapplicable to Iraq Section 201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, 116 Stat. 2322, which has nothing to do with either aid or trade, but rather allows for the execution or attachment of blocked assets of terrorist parties in order to satisfy Section 1605(a)(7)-related judgments. *See Smith*, 280 F. Supp. 2d at 323 (rejecting argument that EWSAA was intended to apply only to laws imposing sanctions on Iraq because "[e]ven if true, the plain meaning of the language Congress chose to use is broad . . . and undeniably encompasses the TRIA"), *aff'd on other grounds*, 346 F.3d 264 (2d Cir. 2003);

Acree v. Snow, 276 F. Supp. 2d 31, 32 (D.D.C.) (Section 1503 authorized President to make TRIA inapplicable to Iraq, "since it is a law that applies to Iraq as a designated state sponsor of terrorism"), *aff'd on other grounds*, 78 Fed. Appx. 133 (D.C. Cir. 2003).

Plaintiffs claim support from the various other clauses in Section 1503, *see* Pl. Br. at 10 n.6, but the breadth and variety of those clauses undercuts their argument even further. Section 1503 contains nine different clauses, the last eight of which are introduced by the words "Provided" or "Provided further." These clauses address a wide range of topics, including but not limited to the Iraq Sanctions Act, the Iran-Iraq Arms Non-Proliferation Act of 1992, various provisions of the Foreign Assistance Act, voting provisions, notice provisions, and sunset provisions.[4] This pattern underscores that the words "Provided" or "Provided further" serve merely to separate dissimilar independent clauses, and that Section 1503 addresses no predominant topic—

[4] To be sure, some of the clauses do simply cabin the scope of authority granted to the President in another clause. For example, suspension of the application of the Iraq Sanctions Act, together with a decision to make inapplicable to Iraq section 620A of the Foreign Assistance Act and other laws restricting exports to Iraq, would allow the export of military equipment, but the fourth clause of Section 1503 continues to prohibit the export of military equipment. Other clauses, however, clearly serve a different purpose. For example, the fifth clause of Section 1503 provides that section 307 of the Foreign Assistance Act (22 U.S.C. § 2227) "shall not apply with respect to programs of international organizations for Iraq." 117 Stat. at 579. Like the third clause, this provision removes a freestanding legal sanction imposed on Iraq and cannot be characterized as merely implementing or constraining the authority to suspend application of the Iraq Sanctions Act.

related to trade or aid or otherwise—that could sensibly limit clear statutory text.[5]

The third canon of construction invoked by plaintiffs provides that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Pl. Br. at 11. Plaintiffs err, however, in contending that this canon supports their proposed construction of Section 1503. In authorizing the President to make inapplicable to Iraq section 620A of the Foreign Assistance Act and "any other provision of law that applies to countries that have supported terrorism," Congress itself specified the relevant criterion of similarity between section 620A and "other" provisions encompassed by Section 1503. Like section 620A, 28 U.S.C. § 1605(a)(7) is a "provision of law that applies to countries that have supported terrorism." These provisions are thus "similar in nature" in the only sense deemed relevant by Congress. Under these circumstances, the canon invoked by plaintiffs simply does not advance their proposed construction. *See, e.g., Norfolk and Western Ry. Co. v. Am. Train*

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[5] Plaintiffs are also wrong to suggest that Section 1503 merely provided an alternative mechanism for rescinding the existing designations of Iraq as a state sponsor of terrorism. *See* Pl. Br. at 10. As previously explained, *see* U.S. St. at 12-13, rescinding a state's terrorist designation may have a narrower substantive effect than making a provision of law entirely inapplicable to Iraq, as is the case with Section 1605(a)(7). Had Congress intended to provide only for such a rescission, Section 1503 could easily have been written to accommodate that intent. Instead, Congress used much broader language, authorizing the President to render terrorism-based statutes generally "inapplicable."

Dispatchers Ass'n, 499 U.S. 117, 129 (1991) (principle of *ejusdem generis* "does not control . . . when the whole context dictates a different conclusion").

Finally, plaintiffs contend that because Section 1605(a)(7) specifies its own temporal application (to misconduct that occurred when a foreign government was designated as a state sponsor of terrorism), that "specific" provision is presumptively not subject to the assertedly more "general" provision of Section 1503. Pl. Br. at 11-12. That analysis is mistaken. The cases cited by plaintiffs address the question of how to reconcile competing statutory provisions or schemes when each is silent about its effect on the other. *See, e.g., Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Here, however, there is no question regarding how to reconcile competing statutes. Congress itself specified that Section 1503—a provision narrowly addressed to changed circumstances in Iraq—makes inapplicable any "provision of law that applies to countries that have supported terrorism." Because Section 1605(a)(7) is clearly such a provision, Section 1503 authorized the President to make it inapplicable to Iraq. The only further question presented is the temporal scope not of Section 1605(a)(7), but of the Presidential Determination that made that provision inapplicable.

B. The Restoration of Iraq's Sovereign Immunity is Not Impermissibly Retroactive

Plaintiffs argue that even if Section 1503 does apply to this case, the restoration of Iraq's sovereign immunity would have an impermissible retroactive effect in the absence of a clear statement that Congress intended such a result. *See* Pl. Br. at 13-20. As already explained, however, the restoration of

Iraq's sovereign immunity is prospective, not retroactive, in effect. *See* U.S. St. at 15-16. A clear statement rule, therefore, does not apply.[6] Such a rule, in any event, would violate established Supreme Court precedent by interfering with the ability of the President to conduct foreign policy. *See id.* at 16-18.

1. The Restoration of Iraq's Sovereign Immunity is Not Retroactive in Effect

When a case implicates a statute enacted after the events in suit, such as here, application of the statute is precluded based on a presumption against retroactivity only if Congress has not clearly prescribed the statute's reach *and* the statute would have a genuinely retroactive effect. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994); *Lindh v. Murphy*, 521 U.S. 320, 324 (1997). A statute, however, is not deemed to have retroactive effect "merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269 (citation omitted). Rather, a statute has a true retroactive effect "when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *INS v. St. Cyr*, 533 U.S. 289, 321 (2001) (internal quotation marks omitted). Moreover, "the judgment whether a particular statute acts retroactively should be

[6] *See Joo v. Japan*, 332 F.3d 679, 683 (D.C. Cir. 2003) (recognizing that it is only necessary to reach the clear statement question if the court determines that "the statute would have a retroactive effect"; otherwise, the "inquiry ends and we apply the statute").

informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* (internal quotation marks omitted).

Under these well-established principles, Section 1503 and Presidential Determination No. 2003-23 are plainly not retroactive in effect. By making Section 1605(a)(7) of the FSIA inapplicable to Iraq, the President and Congress did not impose any new legal duty, liability or burden with respect to the past conduct of plaintiffs. Nor did they take away any substantive rights of plaintiffs or upset any settled expectations.[7] Rather, the legislative and executive actions immediately and prospectively restored Iraq's sovereign immunity from all Section 1605(a)(7) suits as of May 7, 2003, the date of the Presidential Determination. Accordingly, from that date forward, the Court no longer had subject-matter jurisdiction over plaintiffs' claims.

Plaintiffs argue that the restoration of Iraq's immunity does have a retroactive effect because it interferes with their purported "settled expectation" that they could litigate their claims as of 1996, when Section 1605(a)(7) was enacted. Pl. Br. at 19. But as already discussed, *see* U.S. St. at 13-14, and as plaintiffs essentially concede,[8] the President and Congress have the unquestionable authority to preclude or settle hostage-related claims as the Nation's foreign policy requires. Such claims, even

[7] Indeed, as recently made clear by the D.C. Circuit, Section 1605(a)(7) is merely jurisdictional and therefore does not afford plaintiffs any substantive right or cause of action at all. *See Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1033 (D.C. Cir. 2004).

[8] *See* Pl. Br. at 17 ("[T]he decision of whether to 'espouse' such claims lies solely within the President's discretion.").

though pending in courts of the United States, may be precluded without the consent of the claimants, *see Dames & Moore v. Regan*, 453 U.S. 654, 679-80, 686, and without any compensation provided in return, *see Abrahim-Youri v. United States*, 139 F.3d 1462, 1468 (Fed. Cir. 1997). Under such circumstances, it simply cannot be said that plaintiffs had any substantive right or settled expectation in their ability to litigate to judgment a Section 1605(a)(7) suit against Iraq. A right is not vested, or even a right at all, if, for the good of the Nation, it can be taken away at any time and without any redress.[9]

Plaintiffs rely on *Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003), in support of their argument that they had "settled expectations," *see* Pl. Br. at 18, but that case is easily distinguishable from the facts at issue here. In *Joo*, a suit against Japan for sexual slavery and torture that occurred before and during World War II, the D.C. Circuit held that the application of the commercial activity exception to the FSIA,

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[9] Plaintiffs try to undercut the significance of the President's authority to settle such claims by pointing out that Congress always retains authority to abolish retroactively any cause of action. *See* Pl. Br. at 19. Plaintiffs' attempted analogy answers itself. In the domestic context, courts apply a strong presumption against retroactive legislation precisely because of the understanding that Congress does *not* generally act to upset settled expectations. But in the foreign policy context, where the President's foreign affairs power allows him to bypass ordinary legislative processes when settling claims against foreign states, there is no similar presumption that the President will not extinguish private claims as he finds necessary to further the Nation's interests. *See* Section II.B.2, *infra*. Thus, plaintiffs simply cannot claim the type of settled expectations that might be more reasonable in the domestic arena.

enacted in 1976, would have retroactive effect. *See* 332 F.3d at 683-85. Specifically, the Court ruled that subjecting Japan to a suit that it was immune from prior to 1952, when U.S. courts followed the doctrine of "absolute immunity," would impose new legal obligations on Japan and upset that nation's settled expectations that such a suit would be dismissed. *See id.* at 683-84. The Court also noted that allowing the suit to proceed via the application of the commercial activity exception would be contrary to the foreign policy determination of the United States at the time that "all claims against Japan arising out of its prosecution of World War II [we]re to be resolved through intergovernmental settlements" and "without involving the courts of the United States." *Id.* at 684-85.

Joo is thus significantly different from this case in several key respects. First, by not subjecting Japan to jurisdiction under the FSIA for pre-enactment conduct, the D.C. Circuit gave full effect to the express foreign policy of the United States that claims arising from World War II were to be resolved diplomatically and not through litigation. By declining to apply the FSIA, the Court of Appeals thus acted in a manner consistent with, not contrary to, U.S. foreign policy, and avoided enmeshing the courts in resolving World War II era-claims without the clear invitation of Congress. Here, plaintiffs are asking that the Court find that the U.S. foreign policy itself, embodied in Section 1503, has an impermissible retroactive effect by upsetting their expectations. Nothing in *Joo*, however, provides for

such protection of plaintiffs' expectations when they are in direct conflict with U.S. foreign policy.[10]

Moreover, *Joo* is precisely the kind of case—where an entity, contrary to all prior expectations, is subjected to liability years after the relevant conduct took place—that the presumption against retroactivity is designed to protect against in the absence of a clear statement from Congress. *See Landgraf*, 511 U.S. at 270 (presumption against retroactivity "has consistently been explained by reference to the unfairness of imposing new *burdens* on persons after the fact") (emphasis added). Indeed, the cases cited by plaintiffs routinely involved statutes that imposed significant legal burdens after the fact. *See, e.g., St. Cyr*, 533 U.S. at 321-25 (elimination of alien's eligibility for a waiver of deportation had retroactive effect, because alien reasonably relied on the availability of such relief when he agreed to plead guilty); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 510 U.S. 939, 948-50 (1997) (1986 amendment to False Claims Act had retroactive effect when applied to pre-1986 case because it created a new cause of action and thereby imposed new duties and increased liabilities on past conduct); *Landgraf*, 511 U.S. at 281-84 (1991 Civil Rights Act provisions allowing compensatory and punitive damages for Title VII violations could not be

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[10] Nor do the other foreign affairs cases cited by plaintiffs, *see* Pl. Br. at 16, support such a conflict with U.S. foreign policy. *See, e.g., Abrams v. Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173, 187-88 (2d Cir. 2003) (remanding to determine State Department's position, which court described as "crucial" to the analysis); *Jackson v. People's Republic of China*, 794 F.2d 1490, 1492-98 (11th Cir. 1986) (giving *effect* to U.S. foreign policy that FSIA should not apply retroactively to China).

applied in pre-1991 case absent clear statement because it attached new legal burdens by directly increasing a party's liability). Such cases are vastly different from the situation here, where no legal duties or obligations have been retroactively imposed on plaintiffs,[11] where plaintiffs had no ability at all to sue Iraq at the time of the underlying conduct, and where, even after the enactment of Section 1605(a)(7), plaintiffs could have no reasonable expectation or right to litigate their claims without interference as required by the Nation's foreign policy.

Plaintiffs erroneously suggest that laws eliminating jurisdiction *automatically* have retroactive effect when applied to pending cases. *See* Pl. Br. at 14-15. In *Hughes Aircraft*, which plaintiffs cite for this proposition, the Court held that a statute which "*creates* a new *cause of action*," even though "phrased in 'jurisdictional' terms," was retroactive in effect because it spoke "not just to the power of a particular court but to the substantive rights of the parties as well." 520 U.S. at 950, 951 (emphasis added). Such a conclusion is a perfectly logical extension of the Court's consistent presumption against the retroactive application of statutes that subject entities to increased burdens or liabilities for pre-enactment conduct. It is far from clear, however, that *Hughes* has any relevance at all to jurisdiction-*ousting* statutes, which typically remove rather than

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[11] Nor have any new legal consequences attached retroactively with respect to Iraq's conduct. Indeed, Iraq's immunity has simply been restored to the exact state it was in when the acts of hostage taking were committed in 1993 and 1995.

create burdens.[12] *See, e.g., Lindh*, 521 U.S. at 343-44 & n.3 (Rehnquist, J., dissenting) (noting that "nothing in *Hughes* disparaged our longstanding practice of applying *ousting* statutes to pending cases") (emphasis in original). In fact, the D.C. Circuit has specifically held that *Hughes* does not undermine *Hallowell v. Commons*, 239 U.S. 506 (1918), in which the Supreme Court held that jurisdiction-ousting statutes do *not* affect substantive rights (and thus presumptively apply to judgments rendered immediately after their enactment), at least where the underlying claims can be resolved by the Executive Branch. *See LaFontant v. INS*, 135 F.3d 158, 162-65 (D.C. Cir. 1998); *see also* U.S. St. at 22-25 (discussing jurisdiction ousting cases).[13]

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[12] Indeed, *Hughes supports* the immediate application of a jurisdiction-ousting statute in a case such as this, where jurisdiction was granted only *after* the underlying conduct took place, because such a statute "can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties." 520 U.S. at 951.

[13] Plaintiffs cite *Matthews v. Kidder, Peabody & Co.*, 161 F.3d 156 (3d Cir. 1998) and *Scott v. Boos*, 215 F.3d 940 (9th Cir. 2000), *see* Pl. Br. at 15, but unlike Section 1503, the statute at issue in those cases eliminated a cause of action, rather than just jurisdiction, and thus spoke to the substantive rights of the parties in a way that the restoration of Iraq's sovereign immunity does not. Although another case cited by plaintiffs, *Abrams v. Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173 (2d Cir. 2003), did apply *Hughes* to a jurisdiction-ousting statute, its analysis is flawed and inconsistent with decisions of the D.C. Circuit. *Abrams*, for example, does not discuss *Hallowell* or any of the numerous other Supreme Court decisions giving immediate effect to jurisdiction-ousting provisions; and, in *LaFontant*, the D.C. Circuit squarely held that those decisions retain vitality after *Hughes*. *See* 135 F.3d at 164-65. *Abrams* also expressly rejected the D.C. Circuit's analysis of FSIA jurisdiction in *Princz v. Federal Republic of*

Plaintiffs concede that a statute does not have retroactive effect when it "takes away jurisdiction from the federal courts and vests *exclusive* authority in an executive agency to resolve certain disputes." Pl. Br. at 17 (quoting *Lafontant*, 135 F.3d at 162) (emphasis added). Plaintiffs also acknowledge that they may seek espousal of their claims by the Executive Branch. *See id.* Indeed, that is the traditional remedy for claims against a foreign state. *See, e.g., Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950) ("the rights of our citizens against foreign governments are vindicated only by Presidential intervention"); Note, *Avoiding Expropriation Loss*, 79 Harv. L. Rev. 1666, 1666 (1966) (where foreign sovereign immunity prevents litigation in United States courts, injured parties may seek espousal). Nonetheless, plaintiffs claim that because the form of espousal is unclear at this juncture and, in any event, a matter of Presidential discretion, Section 1503 "effectively eliminate[s] [their] right of redress" for their claims against Iraq. Pl. Br. at 18.

The current uncertainty regarding resolution of plaintiffs' claims, however, is hardly surprising given the unfinished business of Iraqi reconstruction. *See* UNSCR 1483 § 23(b) (preserving claims against Iraq until new "internationally recognized government is established"); *cf. Joo*, 332 F.3d at 684 (World War II claims against Japan settled by treaty in 1951). Moreover, plaintiffs are not altogether denied a forum simply because espousal of their claims is

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Germany, 26 F.3d 1166, 1175-76 (D.C. Cir. 1994). *See Abrams*, 332 F.3d at 183-84. In any event, *Abrams* is not instructive on the ultimate question of retroactive effect because it did not resolve whether the plaintiffs in that action had an expectation rising to the level of a substantive right to litigate their case.

committed to the President's discretion. Indeed, in both *Hallowell* and *LaFontant*, the litigant was left with nothing more than the opportunity to seek discretionary relief from the Executive Branch. Although, like in those cases, there is no "guarantee" here of relief, Pl. Br. at 17, plaintiffs have the opportunity to present their claims to the Executive Branch. Thus, elimination of a judicial forum does not affect plaintiffs' substantive rights. *See Hallowell*, 239 U.S. at 508; *LaFontant*, 135 F.3d at 162, 165. Furthermore, even if plaintiffs had no forum to pursue their claims, they had no substantive right or reasonable expectation to litigate their claims against Iraq either (1) at the time of their injuries, because Section 1605(a)(7) had not been enacted, or (2) in the face of changing foreign policy after Section 1605(a)(7)'s enactment, for reasons already explained. The restoration of Iraq's immunity, therefore, is plainly not retroactive at all.

2. A Clear Statement Rule Cannot Apply to Frustrate Foreign Policy

A clear statement rule, in any event, is inapplicable here because it is well-settled that such a rule can not operate to frustrate foreign policy determinations of the political branches. *See* U.S. St. at 13-14, 16-17. In the venerable case of *The Schooner Peggy*, the Supreme Court clearly distinguished cases involving foreign policy judgments from cases where the presumption against retroactivity ordinarily applies:

> It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties; but in great national concerns where

> individual rights acquired by war are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

5 U.S. (1 Cranch) 103, 110 (1801).

Despite this explicit authority, plaintiffs argue that *The Schooner Peggy* actually underscores the applicability of a clear statement rule in the foreign policy context, because the treaty at issue in that case expressly provided for the restoration of the French vessel despite a contrary judgment already issued by the lower court. *See* Pl. Br. at 16. It is plain from the opinion, however, that the Court did not believe that the treaty was as clear as plaintiffs suggest. Although the treaty provided for the restoration of vessels "not yet definitively condemned," 5 U.S. at 107, it did not specifically state whether vessels that had been condemned by a judgment of a lower federal court fit within that definition. It was therefore up to the Court to determine whether or not the lower court's judgment constituted a definitive condemnation of the vessel and, accordingly, whether the treaty should be applied on appeal to overturn the judgment. *See id.* at 108-09. In construing the treaty, the Court

believed it necessary—as evidenced by the passage quoted above—to decide whether a clear statement rule was applicable.[14]

In resolving that question, the Court recognized that in "mere private cases" it would ordinarily "struggle hard" against a retroactive construction (as the Court later confirmed in *Landgraf*), but ultimately held that "in great national concerns," it will not require a particularly clear statement before giving immediate effect to a new law reflecting a foreign policy objective. *Id.* at 110. Due to obvious concerns, the Court made readily apparent that it would not allow an over-zealous application of non-retroactivity principles to defeat the "manifest import" of foreign policy determinations. That principle has endured to this day.

Indeed, the principle announced in *The Schooner Peggy* is inherent in our constitutional framework, because the application of a clear statement rule in such cases would conflict with the President's plenary and exclusive authority to act and make independent judgments in the context of foreign affairs. *See* U.S. St. at 17-18. It is undisputed that Article II of the Constitution vests the President with the principal authority and responsibility for conducting the foreign policy of the United States. *See, e.g., American Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2386 (2003) (President has "vast share of responsibility for the conduct of our foreign relations") (internal quotation marks omitted);

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[14] Notably, the language which plaintiffs argue is required in this case—an explicit statement by Congress that Iraq's sovereign immunity may be restored in pending cases—is far more specific than the language found sufficient by the Supreme Court in *The Schooner Peggy*.

Department of the Navy v. Egan, 484 U.S. 518, 529 (1988) (foreign policy is "the province and responsibility of the executive"); *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948) (President is the "guiding organ in the conduct of our foreign affairs"). Precisely because the President has the "better opportunity" to discern which course of action would best advance the Nation's foreign policy objectives, Congress often empowers the President to act in this area as he sees fit.[15] *Curtiss-Wright*, 299 U.S. at 320; *see also id.* at 324 (Congress may leave the exercise of foreign affairs powers to the President's "unrestricted judgment").

Thus, by broadly and unequivocally authorizing the President to "make inapplicable with respect to Iraq" any law that applies to countries that have supported terrorism, Section 1503 "evinces legislative intent to accord the President broad discretion [and] may be considered to invite measures on independent responsibility." *Dames & Moore*, 453 U.S. at 678 (internal quotation marks omitted). Accordingly, even if there were some ambiguity regarding the application of Section 1503 to pending Section 1605(a)(7) cases, the President's construction of Section 1503 would warrant deference.

Plaintiffs dispute the President's conclusion that Section 1503's broad language and use of the present

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[15] For example, when Congress delegated to the President the authority to impose or waive sanctions against Burma, the Supreme Court noted that "Congress clearly intended . . . to provide the President with flexible and effective authority over economic sanctions against Burma" and to enable him "to respond to change by suspending sanctions in the interest of national security." *Crosby*, 530 U.S. at 374, 375.

tense "make inapplicable" authorized him to restore Iraq's sovereign immunity from pending Section 1605(a)(7) suits. *See* Pl. Br. at 19-20. But authorizing the President to "make [provisions] inapplicable" is a perfectly natural way to describe an intent to cover the future adjudication of cases and the entry of future judgments, which is what is at issue here. Significantly, the Supreme Court has repeatedly applied similarly broad jurisdiction-ousting statutes to pending cases even absent specific guidance from Congress regarding the intended effect on such cases. *See* U.S. St. at 22-25.

The President's construction is also entirely consistent with the foreign policy determination of the political branches, embodied in Section 1503, that the continued application to Iraq of the various legal sanctions imposed as a result of the rogue conduct of the former regime could unduly impede efforts to reconstruct Iraq and to facilitate the development of a stable, peaceful and democratic Iraqi government. *See* U.S. St. at 10-12. Notably, under plaintiffs' interpretation, the President's Determination would *not* make Section 1605(a)(7) inapplicable to Iraq, as the clear language of Section 1503 authorizes. Rather, Section 1605(a)(7) would remain applicable to Iraq until the statute of limitations ran on claims that arose through the end of the Hussein regime. The new Iraqi government, the success of which is of critical importance to the United States, could then be hobbled for years to come by potentially massive judgments arising from the Hussein dictatorship.

Plaintiffs cite no case in which a court thwarted a foreign policy determination of a President based on the application of a clear statement rule. Indeed,

such a result would be extraordinary, especially where the President has acted, as he has here, pursuant to both congressional authorization and his own constitutional authority. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (President's authority in such cases is "at its maximum"). The President's conclusion that Iraq's immunity has been restored in pending Section 1605(a)(7) cases should therefore be given full and immediate effect by this Court.

III. BECAUSE THE COURT LACKS JURISDICTION, IT NEED NOT CONSIDER WHETHER PLAINTIFFS HAVE ALLEGED A VIABLE CAUSE OF ACTION

As previously stated, *see* U.S. St. at 27-28, plaintiffs have not pled a valid cause of action against Iraq to the extent that their complaint relies solely on Section 1605(a)(7). *See Cicippio-Puleo*, 353 F.3d at 1033. Plaintiffs now claim that their cause of action is grounded in 28 U.S.C. § 1606—a provision nowhere cited in their complaint but which they allege allows them to sue Iraq for intentional infliction of emotion distress under "principles of common law." Pl. Br. at 24. The Court need not reach that question, however, because it lacks subject matter jurisdiction and consequently must dismiss this action. In any event, the United States has recently stated its view regarding the scope of 28 U.S.C. § 1606 in *Kilburn v. Islamic Republic of Iran*, No. 03-7117 (D.C. Cir.) (oral argument scheduled for May 14, 2004). Although it is unnecessary to consider that issue here, the United States' *Kilburn* brief is attached hereto for the Court's information.

CONCLUSION

For the foregoing reasons, and the reasons stated in the United States' Statement of Interest, the Court should dismiss plaintiffs' complaint for lack of subject-matter jurisdiction.

Dated: May 5, 2004

Respectfully submitted,

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APPENDIX N

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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ROBERT ALVAREZ
c/o Roberto Alvarez
2634 SW 4th Avenue
Miami, FL 33129
Plaintiffs,

v.

THE REPUBLIC OF IRAQ
c/o Ministry of Foreign Affairs
Baghdad, Republic of Iraq,
THE IRAQI INTELLIGENCE SERVICE c/o Ministry of Foreign Affairs Baghdad, Republic of Iraq, and SADDAM HUSSEIN in his personal capacity and official capacity as PRESIDENT OF THE REPUBLIC OF IRAQ c/o Ministry of Foreign Affairs Baghdad, Republic of Iraq,
Defendants.

FIRST AMENDED COMPLAINT

FIRST AMENDED COMPLAINT FOR DAMAGES[1]

Plaintiffs, Americans taken hostage and tortured by the Republic of Iraq during the Gulf War, and their principally affected family members, bring this action against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein, in his personal capacity and in his official capacity as president of Iraq during the occurrence of the illegal acts. This action is for the personal injury caused to the Plaintiffs as a result of being seized, held hostage, and tortured while held by Iraq in Kuwait and Iraq, and for the personal injury to their family members caused by these acts against their loved ones. Plaintiffs seek redress for personal injury, emotional distress, economic damages, pain and suffering, and solatium, and punitive damages to prevent further hostage taking and torture of Americans. Plaintiffs, as and for their First Amended Complaint, allege as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over all matters in this action with respect to 28 U.S.C. § 1330 as a claim for relief with respect to a foreign state not entitled to immunity under §§ 1605-1607 of that title, including particularly 28 U.S.C. § 1605(a)(7) of the Foreign Sovereign Immunities Act of 1976, *as amended*, ("FSIA"), which provides a general exception from immunity of a foreign state for any case in which money damages are sought for personal injury caused by an act of torture, hostage taking, or the provision of material support or

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[1] Plaintiffs filed their Complaint in this case on March 18, 2003.

resources for such act by an official, employee, or agent of a state designated as a state sponsor of terrorism at the time the illegal acts occurred. Relevant to this provision, the Republic of Iraq was designated as a state sponsor of terrorism by the Department of State on September 13, 1990, following its invasion of Kuwait, prior to its hostage taking and torture of these Americans by Iraqi military and intelligence officials under the direct guidance and control of Saddam Hussein, during the Persian Gulf War. The Republic of Iraq was so designated throughout the period in which the acts complained of in this First Amended Complaint occurred, and it remains so designated.

2. Further, all claimants in this action are nationals of the United States, and the Defendants in this action have been afforded a reasonable opportunity to arbitrate the claims detailed herein for acts occurring in the Republic of Iraq in accordance with accepted international rules of arbitration. A copy of correspondence affording Defendants this opportunity is attached hereto at Tab A. A further offer to enter into such arbitration concerning the claims herein for acts occurring in the Republic of Iraq in lieu of prosecution of the claims in this action was filed with the Complaint and is attached hereto at Tab B. In addition, a renewed offer to enter into such arbitration to accompany the service of this First Amended Complaint is attached hereto at Tab C.

3. This action, brought pursuant to 28 U.S.C. §§ 1330 and 1602-11 of the FSIA, is filed within the limitations period for actions under 28 U.S.C. § 1605(a)(7), as set out in § 1605(f). The Government of the Republic of Iraq, the Iraqi Intelligence Service,

and Saddam Hussein, in his personal capacity and in his official capacity as President of the Republic of Iraq during the occurrence of the illegal acts, were immune from suit in this action prior to the 1996 Amendments to the FSIA by the Anti-Terrorism and Effective Death Penalty Act of 1996, P.L. 104-132, 110 Stat. 1214, 1241 (1996), which added § 1605(a)(7) to the FSIA. That provision tolled the limitations period until effective enactment of these amendments on April 24, 1996, and the ten-year limitation period begins in that month and year and runs until April 2006. Further, the 1996 Amendments adding § 1605(a)(7) were specifically made retroactively applicable by Congress to "any cause of action arising before, on, or after the date of the enactment of this Act." *See* P.L. 104-132, § 221(c), 110 Stat. 1243 (April 24, 1996), *reprinted at* 28 U.S.C.A. § 1605 note.

4. Venue is properly in this district pursuant to 28 U.S.C. § 1391(f)(4) because Defendants are "foreign states" as defined by 28 U.S.C. § 1603(a) & (b). Defendant the Republic of Iraq is a "foreign state" as defined by 28 U.S.C. § 1603(a). Defendants the Iraqi Intelligence Service and Saddam Hussein, in his official capacity as President of the Republic of Iraq, are "agencies or instrumentalities of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such, are also "foreign states" within the meaning of 28 U.S.C. § 1603(a).

5. Plaintiffs acknowledge that the U.S. Court of Appeals for the D.C. Circuit held in *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004), that 28 U.S.C. § 1605(a)(7) and 28 U.S.C. § 1605 note (the "Flatow Amendment" to the FSIA) do not, by their terms, create a cause of action against a

foreign state. Nothing in *Cicippio-Puleo*, however, insulates a terrorist state from being held liable under 28 U.S.C. § 1606, and that case in fact explicitly left open the possibility that causes of action from "some other source of law, including state law," could be pleaded against terrorist states. *Cicippio-Puleo*, 353 F.3d at 1036. As the forum jurisdiction, the District of Columbia provides that source of law. While 28 U.S.C. § 1605(a)(7) strips immunity from the Defendants for their horrific acts against the Plaintiffs, 28 U.S.C. § 1606 provides a vehicle for causes of action against the Defendants for those acts. That section provides that "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity . . . , the foreign state shall be liable in the same manner and to the same extent as a private individual in like circumstances." 28 U.S.C. § 1606. In providing that a "foreign state shall be liable," section 1606 unquestionably creates a cause of action against foreign states. Had the acts of assault, battery, false imprisonment, and intentional infliction of emotional distress upon which Plaintiffs' claims are based been committed by a private individual, he would plainly be subject to liability for those acts. Accordingly, *Cicippio-Puleo* does not preclude seeking to hold perpetrators of torture and hostage taking against American citizens liable, as Congress plainly intended, in this way.

6. Further, although the Flatow Amendment does not create a cause of action running directly against the foreign state, *Cicippio-Puleo* affirmed that the Flatow Amendment does "create a cause of action against officials, employees, and agents" of foreign states "in their personal capacities." 353 F.3d at 1029. Thus, the Flatow Amendment imposes liability

upon any private individual who, while acting as an "agent" of a foreign state, engages in acts of hostage taking and torture (or any other terrorist acts specified in § 1605(a)(7) of the FSIA) that result in personal injury or death to a U.S. national. 28 U.S.C. § 1605 note. By operation of the plain language of § 1606, a terrorist state that engages in such acts is likewise subject to liability.

* * * * *

PLAINTIFFS

15. Plaintiff Robert Simon is a United States citizen, who resides in Herzylia Pituah, Israel. He was taken hostage by Iraq on January 21, 1991, and continued to be held hostage by Iraq until his release on March 2, 1991.

16. Plaintiff Françoise Simon is a United States citizen, who resides in Herzylia Pituah, Israel. She is the spouse of Robert Simon, and was his spouse throughout his period of captivity.

17. Plaintiff Roberto Alvarez is a United States citizen, and a resident of the State of Florida. He was taken hostage by Iraq on January 21, 1991, and continued to be held hostage by Iraq until his release on March 2, 1991.

18. Plaintiff Robert Alvarez is a United States citizen, and a resident of the State of Florida. He is the adult son of Roberto Alvarez.

DEFENDANTS

19. Defendant the Republic of Iraq is a "foreign state" as defined by 28 U.S.C. § 1603, whose activities of torture and resulting tortious personal injury of American hostages and their families as set forth in this First Amended Complaint are within the exceptions to jurisdictional immunity of a foreign

state pursuant to the FSIA. Its officials, employees, and agents carried out the torture and related mistreatment of the American hostages under the direction of Saddam Hussein while acting within the scope of their office, employment, or agency. Irrespective of individual and institutional responsibilities that also exist, the Republic of Iraq is responsible for the hostage taking, torture, and related harm to the American hostages and their family members.

20. Defendant the Iraqi Intelligence Service is an "agency or instrumentality of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such, is a "foreign state" within the meaning of § 1603. The Service and its officials and employees are officials, employees, or agents of the Republic of Iraq who participated in and provided material support and resources to the acts of hostage taking, torture, and related harm to the American hostages and their family members.'

21. Defendant Saddam Hussein, former President of Iraq, was an "official" of Iraq within the meaning of § 1605(a)(7) during the occurrence of the illegal acts. Similarly, for purposes of § 1605(a)(7), he was also an "agency or instrumentality of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such, was a "foreign state" within the meaning of § 1603. Saddam Hussein was at the time of the relevant events the President, and dictator, of a single-party totalitarian state and is simultaneously the Head of the State, the Chair of the Governing Council, the Chairman of the Party, the exclusive appointing authority for all government offices, the director of the budget, the Commander-in-Chief of the Military, and at least the de facto head of the Intelligence Service and all other

agencies and instrumentalities of Iraq. As President of Iraq during the relevant time period of hostage taking, torture and related harm to the American hostages and their family members, Defendant Saddam Hussein was responsible for these injuries while acting within the scope of his office. In that office, he had both direct command responsibility for the torture and related mistreatment of American hostages taken in Kuwait and Iraq, and responsibility for provision of material support to such acts by Iraqi forces. Further, all of the assets of Iraq were ultimately subject to his direction and control. Additionally, he is sued here in his personal capacity.

STATEMENT OF FACTS

22. On January 16, 1991, an international coalition force of thirty-three nations led by the United States commenced active hostilities against Iraq to enforce the U.N. Security Council mandate to withdraw from Kuwait. On February 24, 1991, following expiration of a coalition deadline for Iraq unconditionally to withdraw its forces from Kuwait, the coalition forces began a ground campaign to force compliance with Iraq.

23. On January 21, 1991, while filming the border between Saudi Arabia and Kuwait for a news story on the unrest in the Middle East, Robert Simon, a CBS correspondent, and Roberto Alvarez, a free-lance cameraman working for CBS, along with two of their companions, were taken hostage by Iraqi soldiers in the "no man's land" between the border of Saudi Arabia and Kuwait.

* * * * *

RELIEF REQUESTED

63. **WHEREFORE**, Plaintiffs, as determined by their individual facts as specified herein, and in recognition of the depraved and outrageous conduct of the Defendants, respectfully request the following relief to be entered against all Defendants, The Republic of Iraq, the Iraqi Intelligence Service, and former President Saddam Hussein, in his official capacity and personal capacity, jointly and severally:

(a) General and specific compensatory damages (including paint and suffering) in excess of Fifteen Million Dollars ($15,000,000.00) as to each Plaintiff Robert Simon and Roberto Alvarez;

(b) General and specific compensatory damages (including solatium) in excess of Three Million Dollars ($3,000,000.00) as to each Plaintiff Françoise Simon and Robert Alvarez;

(c) Costs of this suit;

(d) Reasonable attorneys' fees; and

(e) Such further relief as the Court may deem just and proper.

64. **PLAINTIFFS FURTHER RESPECTFULLY REQUEST** the following additional relief to be entered against Defendants, the Iraqi Intelligence Service, and President Saddam Hussein in his official capacity as President of the Republic of Iraq, jointly and severally:

(a) Punitive damages in excess of One Hundred Million Dollars ($100,000,000.00), to be shared equally between all Plaintiffs; and

(b) Such further relief as the Court may deem just and proper.

Respectfully submitted,
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Attorney for the Plaintiffs

Dated September 13, 2004

APPENDIX O

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NABIL SEYAM
9405 East Lakepoint
Wichita, KS 67226,
AHMAD SEYAM
9405 East Lakepoint
Wichita, KS 67226,
YUSEF SEYAM
9405 East Lakepoint
Wichita, KS 67226,
MELISSA SEYAM
2357 N. Rutland Court
Wichita, KS 67226,
CARRIE SEYAM
7650 East 32nd Street North, Apt. 307 Wichita, KS 67226, Plaintiffs,
v.
THE REPUBLIC OF IRAQ c/o. Ministry of Foreign Affairs Baghdad, Republic of Iraq, THE IRAQI INTELLIGENCE SERVICE c/o Ministry of Foreign Affairs Baghdad, Republic of Iraq, and SADDAM HUSSEIN in his personal capacity and his official capacity as PRESIDENT OF THE REPUBLIC OF IRAQ c/o Ministry of Foreign Affairs, Baghdad, Iraq,
Defendants.

No. 1:03CV00888 (RBW)

SECOND AMENDED COMPLAINT

SECOND AMENDED COMPLAINT FOR DAMAGES

Nabil Seyam, an American taken hostage by the Republic of Iraq just before the first Gulf War, and certain immediate family members bring this action against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein, in his personal capacity and in his official capacity as President of Iraq during the occurrence of the illegal acts. This action is for the personal injury caused to the Plaintiffs as a result of being seized, held hostage and tortured while held by Iraq in Kuwait and Iraq, and for the personal injury to Seyam's family members caused by these acts. Plaintiffs seek redress for personal injury, emotional distress, economic damages, pain and suffering, loss of consortium, and solatium, and punitive damages to prevent future hostage taking and torture of Americans. Plaintiffs allege as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over all matters in this action with respect to 28 U.S.C. § 1330 as a claim for relief with respect to a foreign state not entitled to immunity under §§ 1605-1607 of that title, including particularly 28 U.S.C. § 1605(a)(7) of the Foreign Sovereign Immunities Act of 1976, as amended, ("FSIA"). Section 1605(a)(7) provides a general exception from immunity of a foreign state for any case in which money damages are sought for personal injury caused by an act of torture, hostage taking, or the provision of material support or resources for such acts by an official, employee, or agent of a state designated as a state sponsor of terrorism at the time the illegal acts occurred. Relevant to this provision, the Republic of Iraq was

designated as a state sponsor of terrorism by the Department of State on September 13, 1990, following its invasion of Kuwait, prior to its hostage taking and torture of Seyam by Iraqi military and intelligence officials under the direct guidance and control of Saddam Hussein. The Republic of Iraq was so designated throughout the period in which the acts complained of in this Second Amended Complaint occurred and it remains so designated.

2. Further, all claimants in this action are nationals of the United States, and the Defendants in this action have been afforded a reasonable opportunity to arbitrate the claims detailed herein for acts occurring in the Republic of Iraq in accordance with accepted international rules of arbitration. A copy of correspondence affording Defendants this opportunity is attached hereto at Tab A. A further offer to enter into such arbitration concerning the claims herein for acts occurring in the Republic of Iraq in lieu of prosecution of the claims in this action has been filed with this Second Amended Complaint and is attached hereto at Tab B. In addition, a renewed offer to enter into such arbitration to accompany the service of this Second Amended Complaint is attached hereto at Tab C.

3. Plaintiffs acknowledge that the U.S. Court of Appeals for the D.C. Circuit held in *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004), that 28 U.S.C. §1605(a)(7) and 28 U.S.C. § 1605 note (the "Flatow .Amendment" to the FSIA) do not, by their terms, create a cause of action against a foreign state. Nothing in *Cicippio-Puleo*, however, insulates a terrorist state from being held liable under 28 U.S.C. § 1606, and that case in fact explicitly left open the possibility that causes of

action from "some other source of law, including state law," could be pleaded against terrorist states. *Cicippio-Puleo*, 353 F.3d at 1036. As the forum jurisdiction, the District of Columbia provides that source of law. At bottom, §1605(a)(7) is the means to waiving a foreign state's sovereign immunity and the statute by which jurisdiction attaches. The provision then allows a claim to be brought based on tort causes of action by virtue of § 1606. *Cicippio-Puleo* does not preclude seeking to hold perpetrators of torture and hostage taking against American citizens liable, as Congress plainly intended, in this way.

4. While 28 U.S.C. § 1605(a)(7) strips immunity from the Defendants for their horrific acts against the Plaintiffs, 28 U.S.C. § 1606 provides a vehicle for causes of action against the Defendants for those acts. That section provides that "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity. . ., the foreign state shall be liable in the same manner and to the same extent as a private individual in like circumstances." 28 U.S.C. § 1606. In providing that a "foreign state shall be liable," section 1606 unquestionably creates a cause of action against foreign states. Had the acts of assault, battery, false imprisonment, and intentional infliction of emotional distress upon which Plaintiffs' claims are based been committed by a private individual, he would plainly be subject to liability for those acts. Accordingly, the *Cicippio-Puleo* decision provides no basis for dismissing Plaintiffs' outstanding claims.

5. Further, although the Flatow Amendment does not create a cause of action running directly against the foreign state, *Cicippio-Puleo* affirmed that the Flatow Amendment does "create a cause of action

against officials, employees, and agents" of foreign states "in their personal capacities." 353 F.3d at 1029. Thus, the Flatow Amendment imposes liability upon any private individual who, while acting as an "agent" of a foreign state, engages in acts of hostage taking and torture (or any other terrorist acts specified in section 1605(a)(7) of the FSIA) that result in personal injury or death to a U.S. national. 28 U.S.C. § 1605 note. By operation of the plain language of § 1606, a terrorist state that engages in such acts is likewise subject to liability.

6. This action, brought pursuant to 28 U.S.C. §§ 1330 & 1602-11 of the FSIA, is filed within the limitations period for actions under 28 U.S.C. § 1605(a)(7), as set out in § 1605(f). The Government of the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein, in his personal capacity and in his official capacity as President of the Republic of Iraq during the occurrence of the illegal acts, were immune from suit in this action prior to the 1996 Amendments to the FSIA by the Anti-Terrorism and Effective Death Penalty Act of 1996, P.L. 104-132, 110 Stat. 1214, 1241 (1996), which added § 1605(a)(7) to the FSIA. That provision tolled the limitations period until effective enactment of these amendments on April 24, 1996, and the ten-year limitations period begins in that month and year and runs until April 2006. Further, the 1996 Amendments adding § 1605(a)(7) were specifically made retroactively applicable by Congress to "any cause of action arising before, on, or after the date of the enactment of this Act." *See* P.L. 104-132, § 221 (c), 110 Stat. 1243 (April 24, 1996), *reprinted at* 28 U.S.C.A. § 1605 note.

7. Venue is properly in this district pursuant to 28 U.S.C. § 1391(f)(4) because Defendants are "foreign states" as defined by 28 U.S.C. § 1603(a) and (b). Defendant Republic of Iraq is a "foreign state" as defined by 28 U.S.C. § 1603(a). Defendants the Iraqi Intelligence Service and Saddam Hussein, in his official capacity as President of the Republic of Iraq, are or were "agencies or instrumentalities of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such, are also "foreign states" within the meaning of 28 U.S.C. § 1603(a).

* * * * *

PLAINTIFFS

15. Plaintiff Nabil Seyam is a United States citizen, who resides in Wichita, Kansas. He was taken hostage by Iraq on October 1, 1990, and continued to be held hostage by Iraq until his release on October 19, 1990.

16. Plaintiff Melissa Seyam is a United States citizen, and a resident of the State of Kansas. She is the daughter of Nabil Seyam.

17. Plaintiff Ahmad Seyam is a United States citizen, and a resident of the State of Kansas . He is the son of Nabil Seyam.

18. Plaintiff Yusef Seyam is a United States citizen, and a resident of the State of Kansas. He is the son of Nabil Seyam.

19. Plaintiff Carrie Seyam is a United States citizen, and a resident of the State of Kansas. She is the former spouse of Nabil Seyam.

DEFENDANTS

20. Defendant the Republic of Iraq is a "foreign state" as defined by 28 U.S.C. § 1603, whose

activities of torture and resulting tortious personal injury of American hostages and their families as set forth in this Second Amended Complaint are within the exceptions to jurisdictional immunity of a foreign state pursuant to the FSIA. Its officials, employees, and agents carried out the torture and related mistreatment of Nabil Seyam under the direction of Saddam Hussein while acting within the scope of their office, employment, or agency. Irrespective of individual and institutional responsibilities that also exist, the Republic of Iraq is responsible for the hostage taking, torture, false imprisonment, assault, battery and emotional. distress intentionally inflicted on Seyam and his family members.

21. Defendant the Iraqi Intelligence Service is an "agency or instrumentality of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such, is a "foreign state" within the meaning of § 1603. The Service and its officials and employees are officials, employees, or agents of the Republic of Iraq who participated in and provided material support and resources to the acts of hostage taking, torture, false imprisonment, assault, battery and emotional distress intentionally inflicted on Seyam and his family members.

22. Defendant Saddam Hussein, former President of Iraq, was an "official" of Iraq within the meaning of § 1605(a)(7) during the occurrence of the illegal acts. Similarly, for purposes of § 1605(a)(7), he was also an "agency or instrumentality of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such, was a "foreign state" within the meaning of § 1603. Saddam Hussein was at the time of the relevant events the President, and dictator, of a single-party totalitarian state and was simultaneously the Head

of the State, the Chair of the Governing Council, the Chairman of the Party, the exclusive appointing authority for all government offices, the director of the budget, the Commander-in-Chief of the Military, and at least the de facto head of the Intelligence Service and all other agencies and instrumentalities of Iraq. As President of Iraq during the relevant time period of hostage taking, torture, false imprisonment, assault, battery and emotional distress intentionally inflicted on Seyam and his family members, Defendant Saddam Hussein is responsible for these injuries while acting within the scope of his office. He is sued in his personal capacity and in his official capacity as President of Iraq. In that office, he had both direct command responsibility for the torture and related mistreatment of American hostages taken in Kuwait and Iraq, and responsibility for provision of material support to such acts by Iraqi forces.

STATEMENT OF FACTS

23. On August 2, 1990, the Republic of Iraq invaded and occupied its neighbor Kuwait. On October 1, 1990, Nabil Seyam, a safety engineer for the Kuwait Metal Pipe Industries Company, who had been hiding from Iraqi forces for two months, was kidnapped and taken hostage by Iraqi soldiers manning a checkpoint in Kuwait.

* * * * *

RELIEF REQUESTED

63. **WHEREFORE**, Plaintiffs, as determined by their individual facts as specified herein, and in recognition of the depraved and outrageous conduct of Defendants, respectfully request the following relief to be entered against all Defendants, the Republic of

Iraq, the Iraqi Intelligence Service, and President Saddam Hussein, in his official capacity as President of the Republic of Iraq, jointly and severally:

(a) General and specific compensatory damages (including pain and suffering) in excess of Three Million Dollars ($3,000,000.00 as to Plaintiff Nabil Seyam;

(b) General and specific compensatory damages (including solatium) in excess of One Million Dollars ($1,000,000.00) as to each Plaintiff, Ahmad Seyam, Melissa Seyam, Yusef Seyam, and Carrie Seyam;

(c) Costs of this suit;

(d) Reasonable attorneys' fees; and

(e) Such further relief as the Court may deem just and proper.

56. **PLAINTIFFS FURTHER RESPECTFULLY REQUEST** the following additional relief to be entered against Defendants, the Iraqi Intelligence Service, and President Saddam Hussein in his official capacity as President of the Republic of Iraq, jointly and severally:

(a) Punitive damages in excess of One Hundred Million Dollars ($100,000,000.00), to be shared equally between all Plaintiffs; and

(b) Such further relief as the Court may deem just and proper.

Dated: October 6, 2004

Respectfully submitted,

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APPENDIX P

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JORDAN BEATY, AUSTIN MAKENZIE BEATY, a minor by her next friend ROBIN BEATY, BRYAN C. BARLOON and REBECCA L. BARLOON Plaintiffs v. REPUBLIC OF IRAQ Defendant.	Civil Action No.: 1:03CV00215 (JDB)

THIRD AMENDED COMPLAINT

Plaintiffs, by and through their undersigned counsel, bring this action for intentional infliction of emotional distress arising under State common law, for violations of customary international law, and for loss of solatium, stemming from hostage-taking and resulting captivity of their respective fathers, Kenneth Beaty and William Barloon, by Defendant Republic of Iraq. Plaintiffs seek judgment against Defendant Republic of Iraq, and in support of their Third Amended Complaint, aver as follows:

JURISDICTION AND VENUE

1. Jurisdiction over the subject matter of this case arises from 28 U.S.C. § 1330(a). Defendant Republic of Iraq is subject to suit in the courts of the United States pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7), as amended.

2. Plaintiffs have previously offered to arbitrate according to international rules of arbitration pursuant to 28 U.S.C. § 1605(a)(7). A copy of such Offer to Arbitrate is attached hereto.

3. Venue is proper in this District pursuant to 28 U.S.C. § 1391(f)(4).

THE PARTIES

4. Plaintiffs Jordan Beaty and Austin Makenzie Beaty, citizens of the United States, are the daughters of Kenneth Beaty and Robin Beaty, Plaintiffs in *Daliberti v. Republic of Iraq* (Case No. 96 CV01118), 146 F. Supp. 2d 19 (D.D.C. 2001) (hereinafter, the "*Daliberti* Case"). Plaintiffs Jordan Beaty and Austin Makenzie Beaty are residents of the State of Oklahoma.

5. Plaintiffs William R. Barloon, Bryan C. Barloon and Rebecca L. Barloon are the children of William Barloon and Linda Barloon, plaintiffs in the *Daliberti* Case. Plaintiff William R. Barloon, Bryan C. Barloon and Rebecca L. Barloon are residents of the State of Florida.

6. Defendant Republic of Iraq is a foreign state that between 1990, and March 2003, had been designated a state sponsor of terrorism, pursuant to section 6(j) of the Export Administration Act of 1979, 50 U.S.C. § 2405(j). The Acting Iraqi Ambassador to Washington,

D.C. is Rend al-Rahim. The Iraqi Embassy is located at 1801 P. Street, N.W., Washington, D.C., 20036. Service may be effected upon Defendant Republic of Iraq pursuant to 28 U.S.C. § 1608.

FACTS OF THE CASE

7. Following the conclusion of hostilities between the United States and Defendant Republic of Iraq in 1991, Kenneth Beaty and William Barloon each resided in Kuwait on a temporary basis. Mr. Beaty worked as an oil rig drilling supervisor. Mr. Barloon supervised aircraft maintenance and overhaul.

8. On or about April 25, 1993, Mr. Beaty was traveling within the borders of Kuwait en route to an oil rig located within sight of the Kuwait-Iraqi border.

9. Mr. Beaty stopped at an Iraqi border checkpoint and displayed his credentials to the Iraqi border guards. Mr. Beaty explained to the border guards that he wished only to travel to the oil rig using appropriate roads within the borders of Kuwait. The border guards--all of whom were agents of the Defendant Republic of Iraq and were acting within the scope of their office, employment or agency—arrested Mr. Beaty.

10. The border guards then blindfolded Mr. Beaty and transported him at gunpoint, first to Basra, Iraq, and later to Baghdad. Once in Baghdad, Mr. Beaty was held as a hostage for ransom and was confined to a prison cell for 205 days.

* * * * *

14. On or about March 13, 1995, William Barloon was traveling near the Kuwait-Iraqi border when he encountered an Iraqi border guard.

15. The border guard, an agent of Defendant Republic of Iraq, checked Mr. Barloon's identification, which demonstrated that he was a citizen of the United States. The border guard, acting within the scope of his office, employment or agency, took William Barloon into custody.

16. Initially, Mr. Barloon was transported at gunpoint to Basra, Iraq, and later to Baghdad, where he was held captive at Abu Ghreib prison.

17. During his 126 days in captivity, Mr. Barloon was beaten, subjected to mock executions and deprived of adequate, food, water, medical care and access to toilet facilities. Mr. Barloon lost a significant amount of weight and became hopeless and despondent.

* * * * *

23. Throughout their ordeal, Plaintiffs were acutely aware of the circumstances surrounding their fathers' hostage-taking and mistreatment. Plaintiffs knew their fathers were being held captive by Defendant Republic of Iraq without any legal justification. Through various media sources, Plaintiffs were able to see where their fathers were being held. Through these and other sources, Plaintiffs contemporaneously learned and understood that their fathers were deprived of adequate food, water and medical care had lost substantial weight and were emotionally distraught.

24. Because of their fathers' captivity, Plaintiffs were totally dependent upon their mothers for financial and emotional support. However, Plaintiffs'

mothers were not in a position to provide such support because they suffered extreme emotional distress as a result of their husbands' ordeal. Mrs. Beaty and Mrs. Barloon devoted themselves to various efforts to secure their husbands' release. Such efforts often took them away from their children, both physically and emotionally, for extended periods.

* * * * *

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment that be entered against Defendant Republic of Iraq in the following amounts:

a. Compensatory damages in excess of $566,000.00 to Jordan Beaty;

b. Compensatory damages in excess of $566,000.00 to Robin Beaty, as next friend Austin Makenzie Beaty;

c. Compensatory damages in excess of $348,000.00 to William R. Barloon;

d. Compensatory damages in excess of $348,000.00 to Bryan C. Barloon;

e. Compensatory damages in excess of $348,000.00 to Rebecca L. Barloon;

f. Reasonable costs and expenses; and

g. Such other and further relief which the Court may determine to be just and equitable under the circumstances.

Dated: May 20, 2005

Respectfully submitted,

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Counsel for Plaintiffs

APPENDIX Q

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT SIMON, et al., **Plaintiffs,** **v.** **REPUBLIC OF IRAQ, et al.,** **Defendants.**	**Civil Action 03-0069 (HHK)**

JUDGMENT

Pursuant to Rule 58 of the Federal Rules of Civil Procedure, and for the reasons stated by the court in its memorandum opinion docketed this same day, it is this 7th day of September 2006, hereby

ORDERED and **ADJUDGED** that the complaint in this case is **DISMISSED**; and it is further

ORDERED that, pursuant to Fed. R. Civ. P 54(b), his judgment is a final judgment, there being no just reason for delay.

Henry H. Kennedy, Jr.
United States District Judge

APPENDIX R

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NABIL SEYAM, et al. **Plaintiffs,** **v.** **REPUBLIC OF IRAQ, et al.** **Defendants**	**Civil Action 03-00888 (HHK)**

JUDGMENT

Pursuant to Rule 58 of the Federal Rules of Civil Procedure, and for the reasons stated by the court in its memorandum opinion docketed this same day, it is this 7th day of September 2006, hereby

ORDERED and **ADJUDGED** that the complaint in this case is **DISMISSED**; and it is further

ORDERED that, pursuant to Fed. R. Civ. P 54(b), this judgment is a final judgment, there being no just reason for delay.

Henry H. Kennedy, Jr.
United States District Judge

APPENDIX S

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES S. VINE, et al., **Plaintiffs,** **v.** **REPUBLIC OF IRAQ,** **Defendant.**	**Civil Action 01-02674 (HHK)**
ROBERT SIMON, et al., **Plaintiffs,** **v.** **REPUBLIC OF IRAQ, et al.,** **Defendants.**	**Civil Action 03-00691 (HHK)**
NABIL SEYAM, et al., **Plaintiffs,** **v.** **REPUBLIC OF IRAQ, et al.,** **Defendants.**	**Civil Action 03-00888 (HHK)**

MEMORANDUM OPINION AND ORDER

These three consolidated actions all challenge the conduct of the Republic of Iraq ("Iraq") during the period prior to the first Gulf War in 1990. Plaintiffs in all three cases allege that, during the course of its invasion of the State of Kuwait, Iraq unlawfully took

plaintiffs hostage and, in some cases, tortured them. Before the court are defendants'[1] motions to dismiss, filed in these cases prior to consolidation. Upon consideration of defendants' motions, the oppositions thereto, and the record of the case, the court concludes that defendants' motions should be granted in Civil Actions 03-000691 and 03-00888 and granted in part and denied in part in Civil Action 01-02674.

I. BACKGROUND

The facts underlying this consolidated action as alleged by plaintiffs are as follows. On August 2, 1990, Iraqi armed forces invaded Kuwait, seizing control of the country. Immediately thereafter, Saddam Hussein, then-President of Iraq, issued a directive prohibiting all foreign nationals, including more than 2,000 American citizens, from leaving Iraq and Kuwait. In both countries, American citizens were denied access to their passports, refused exit visas, and physically prevented from leaving the cities of Baghdad and Kuwait City by the use of roadblocks. Approximately two weeks later, Hussein ordered all American citizens to report to hotels in those two cities. Those who obeyed his order, as well as others captured by Iraqi authorities, were forcibly relocated to strategic sites in Iraq where they served as "human shields" to prevent an attack by the allied forces. Additionally, a large number of Americans sought safe haven from Iraqi military forces by seeking refuge in either diplomatic

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[1] In addition to Iraq, Saddam Hussein, then-President of Iraq, and the Iraqi Intelligence Service are named as defendants in Civil Actions 03-000691 and 03-00888. Collectively, the defendants will be referred to as "Iraq."

properties or in private residences and "safehouses" throughout Kuwait and Iraq.

On August 19, 1990, President George H.W. Bush declared that all United States citizens in Kuwait and Iraq, regardless of whether they were in the physical custody of Iraqi forces, were "hostages" because they were being used by Hussein as leverage to prevent the United States and its allies from attacking Iraq and liberating Kuwait. President Bush demanded that Hussein release all American citizens and warned that the Iraqi government would be responsible for their safety and well-being.

By the end of August, Hussein authorized the release of all American women and children and several American male hostages with serious medical conditions. At the same time, Hussein promised to release the remaining hostages in exchange for a promise from the United States not to attack Iraq. The United States refused to accede to Hussein's demands and repeated its call for the release of all American citizens in Kuwait and Iraq.

On September 1, 1990, as a result of the illegal seizure and detention of American citizens in Kuwait and Iraq, the U.S. Department of State designated Iraq a "terrorist state" under 50 U.S.C. § 2405(j).

Between September 1, 1990, and December 1990, Hussein intermittently permitted the release of small groups of the remaining male hostages for medical and "humanitarian" purposes. The hostage situation ultimately came to an end in the second week of December 1990 when Hussein ordered the release of the last group of approximately 250 American hostages.

During their captivity, the American hostages were subject to conditions of confinement that were "harsh, cruel, degrading, and often terrorizing." *Vine* Third Am. Compl. (Civ. No. 01-2674) ("*Vine* TAC") ¶ 4. These hostages "lived in constant fear for their lives and suffered from fatigue, depression, severe anxiety and stress, and the loss of the companionship of their loved ones." *Id.*

In 1999, a class action was filed on behalf of hundreds of the American citizens, and their spouses, who were held hostage by Iraq. *Hill v. Republic of Iraq*, Civ. No. 99-3346 (D.D.C.) (Jackson, J.). Iraq failed to appear in this action, and the case proceeded by default before Judge Jackson. On June 29, 2001, Judge Jackson denied the *Hill* plaintiffs' motion for class certification. Subsequently, on December 5, 2001, Judge Jackson imposed a moratorium on the addition of new plaintiffs and assertedly informed plaintiffs' counsel that any other former hostages who wished to bring claims against Iraq would have to file a separate suit.

Three weeks later, having been precluded from participating in the *Hill* litigation, plaintiffs in one of the consolidated cases in this matter, *Vine, et al. v. Republic of Iraq*, Civ. No. 01-2674 (D.D.C.), filed their complaint.[2] The third amended complaint in *Vine*, which includes class action allegations, names 236 plaintiffs, all of whom were either taken hostage

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[2] Plaintiffs' original complaint was filed on December 27, 2001, by Vine and thirty-four others. Three times thereafter, plaintiffs amended their complaint adding a total of 201 more individuals as plaintiffs.

by Iraq in 1990 and/or were spouses of individuals who were taken hostage.[3]

In 2003, two more related cases were filed in this jurisdiction. The first, *Simon, et al. v. Republic of Iraq, et al.*, Civ. No. 03-691 (D.D.C.), involves allegations that two individuals—Robert Simon, a CBS News reporter, and Roberto Alvarez, a cameraman working for CBS News—were illegally seized and subsequently tortured by Iraqi officials in 1991. The second, *Seyam, et al. v. Republic of Iraq, et al.*, Civ. No. 03-888 (D.D.C.), involves similar allegations by plaintiff Nabil Seyam. The three suits were consolidated in May 2005.

II. ANALYSIS

A. Statutory Framework of the Foreign Sovereign Immunities Act

As a general rule, the Foreign Sovereign Immunities Act ("FSIA"), enacted in 1976, establishes that foreign states (including "a political subdivision of a foreign state or an agency or instrumentality of a foreign state," 28 U.S.C. § 1603(a)), are immune from suit in courts in the United States. 28 U.S.C. § 1604.[4] A limited number

[3] Two hundred of these plaintiffs were physically present in Iraq or Kuwait on August 2, 1990. Seventy were married to an American hostage who was physically present in Iraq or Kuwait on August 2, 1990. Of these seventy spouses, thirty-four were themselves in Iraq during 1990 but were released prior to their spouses.

[4] Section 1604 of FSIA, 28 U.S.C. § 1604, states:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605-1607 of this chapter.

of exceptions to this general rule of immunity are enumerated. *Id.* § 1605. The most recent of the exceptions, and the one implicated in this case, provides that a foreign state "shall not be immune from the jurisdiction of courts of the United States or of the States in any case" where "money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act." *Id.* § 1605(a)(7).

In order for this so-called "state-sponsored terrorism exception" to apply, three criteria must be satisfied: (1) the foreign state must be designated as a state sponsor of terrorism at the time of the terrorist act or as a result of the terrorist act; (2) the foreign state must be afforded a reasonable opportunity to arbitrate the claim if the act occurred within the foreign state against which the claim has been brought; and (3) either the claimant or the victim must have been a national of the United States at the time of the terrorist act. *Id.* § 1605(a)(7)(A),(B); *see also Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1028-29 (D.C. Cir. 2004).

Section 1605(a)(7) of FSIA is "merely a jurisdiction-conferring provision that does not otherwise provide a cause of action against either a foreign state or its agents." *Cicippio-Puleo*, 353 F.3d at 1032. To determine what causes of action, if any, may be pressed against a non immune foreign state, FSIA directs courts to pre-existing causes of action. Specifically, § 1606 of FSIA provides, in relevant part:

> As to any claim for relief with respect to which a foreign state is not entitled to immunity . . . , the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.

28 U.S.C. § 1606. Based on this language, "a plaintiff should be able to bring a cause of action under state or common law, federal statutes (where Congress has not indicated otherwise), and even possibly the law of a foreign country in a Section 1605(a)(7) case, as long as the plaintiff would be able to bring such a claim against an individual in similar circumstances." *Holland v. Islamic Republic of Iran*, 2005 U.S. Dist. LEXIS 40254, at *35-36 (D.D.C. Oct. 31, 2005).

B. Subject Matter Jurisdiction

Iraq argues that the court lacks subject matter jurisdiction over the claims of at least 170 of the plaintiffs in the *Vine* litigation, contending that the state-sponsored terrorism exception does not apply to the claims of those plaintiffs because they were not taken "hostage" as FSIA defines that term. Iraq correctly states that the state-sponsored terrorism exception embodied in 28 U.S.C. § 1605(a)(7) "does not abrogate the sovereign immunity of nations the Department of State has designated state sponsors of terrorism for any and all purposes." Def.'s Mot. (Civ. No. 01-2674) at 4. Rather, § 1605(a)(7) only waives the immunity of such states with respect to claims "for personal injury or death that was caused by an act or torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act." 28 U.S.C. § 1605(a)(7).

The *Vine* plaintiffs do not allege that their claims arise from acts of "torture," "extrajudicial killing," or "aircraft sabotage." Rather, their claims all arise from the "hostage taking" that occurred when Saddam Hussein's regime assertedly detained them at the outbreak of hostilities between Kuwait and Iraq in 1990. Hostage taking is defined in § 1605(e) of FSIA to have "the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages." 28 U.S.C. § 1605(e)(2). Article 1 of the International Convention Against the Taking of Hostages, in turn, states:

> Any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages.

U.N. GAOR, Supp. No. 39, U.N. Doc. A/34/39 (1979). Iraq insists that at least 170 of the *Vine* plaintiffs—those who were not physically held by Iraqi forces but rather received sanctuary at various diplomatic premises or found haven in private safehouses after the invasion of Kuwait—were not "seized" or "detained" by Iraq and that, even assuming they were, the purpose of such "detention" was not to compel a third party to do or refrain from doing something. Accordingly, Iraq insists that FSIA does not waive its immunity with respect to the claims of these plaintiffs and their claims must be dismissed. The court disagrees.

As the Fifth Circuit has held, "a hostage is 'seized' or 'detained' . . . when she is held or confined against her will for an appreciable period of time." *United States v. Carrion-Caliz*, 944 F.2d 220, 225 (5th Cir. 1991).[5] In an analogous criminal case, the Second Circuit clarified that the government "need not show that the defendant actually used physical force or violence to restrain that person" in order to prove that a hostage was held against her will. *United States v. SiLu Tian*, 339 F.3d 143, 153 (2d Cir. 2003). Rather, all that is necessary is evidence that "the defendant threatened, frightened, deceived or coerced his hostage so as to cause the hostage to remain under the defendant's control." *Id.*; *see also Carrion-Caliz*, 944 F.2d at 227 (holding that the victims were taken hostage when the defendant "frightened or deceived them sufficiently to cause them to remain in his house").

Moreover, as Judge Jackson wrote in the *Hill* litigation, the "essence of the tort of hostage taking is false imprisonment," 175 F. Supp. 2d at 46, which is defined in the District of Columbia as the unlawful "detention or restraint of one against his will, within boundaries fixed by the defendant." *Faniel v. Chesapeake & Potomac Tel. Co.*, 404 A.2d 147, 150 (D.C. 1979); *see also Abourezk v. New York Airlines*,

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[5] In *Carrion-Caliz*, the Fifth Circuit was interpreting the Hostage Taking Act, which provides that "whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or governmental organization to do or abstain from any act . . . shall be punished by imprisonment by any term of years or for life." 18 U.S.C. § 1203(a)

Inc., 895 F.2d 1456, 1458 (D.C. Cir. 1990).[6] In this context, a plaintiff is detained whenever the defendant "deprive[s] the plaintiff of his freedom of locomotion for any length of time by force or threat of force." *Dist. of Columbia v. Gandy*, 450 A.2d 896, 899 (D.C. 1982). All the *Vine* plaintiffs, even those not in the physical control of Iraq, are alleged to have been deprived of their freedom of locomotion by being constructively confined, by force or threat of force, to safehouses and diplomatic properties.

Furthermore, those plaintiffs who were not in the physical custody of Iraq assertedly "spent most of their time in detention hiding in private residences and 'safehouses'" where they lived "under harsh conditions and in constant fear of being discovered by Iraqi security forces." *Vine* TAC ¶ 19. It is a reasonable inference from these allegations that such

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[6] Iraq insists that analogizing "hostage taking" in FSIA to the tort of false imprisonment is inappropriate given the criminal nature of the International Convention Against the Taking of Hostages. Def.'s Reply (Civ. No. 01-2674) at 3. Because the Convention assertedly covers "penal matters," Iraq insists that the rule of lenity applies and that any ambiguity in the language of the statutory definition of "hostage taking" must therefore be resolved in its favor. In making this argument, Iraq fails to recognize that it is a defendant in a case brought under the state-sponsored terrorism exception of FSIA, which waives immunity only for *civil* claims. 28 U.S.C. § 1605(a)(7) (waiving immunity of a foreign state sponsor of terrorism in cases "in which money damages are sought"). The fact that the state-sponsored terrorism exception incorporates a definition from a treaty that covers "penal matters" does not change the fact that Iraq here is susceptible to solely civil penalties. *See United States v. Crippen*, 371 F.3d 842, 844 (D.C. Cir. 2004) ("[T]he rule of lenity requires that we interpret an ambiguous *criminal statute* in the defendant's favor.") (emphasis added). Because FSIA is not a criminal statute, and Iraq is not a criminal defendant, the rule of lenity has no application.

deprivation of freedom was "against their will." As such, all of the *Vine* plaintiffs—even those not under Iraq's direct control—were "seized" or "detained" within the meaning of the FSIA.

Iraq's second argument—that those plaintiffs who were not in the physical custody of Iraq were not hostages given that the purpose of their alleged detention was not to compel a third party to do or refrain from doing something—is likewise unconvincing. The *Vine* plaintiffs' Third Amended Complaint certainly includes allegations that all plaintiffs were used to extract concessions from the United States. Specifically, the *Vine* plaintiffs allege that all Americans, including those forced into hiding by Iraq's actions, were used by Saddam Hussein to "compel the United States and other foreign states to abstain from launching an armed attack upon Iraq as an explicit or implicit condition for the[ir] release." *Vine* TAC ¶ 27. These allegations are sufficient, at this point in the litigation, to establish that those in hiding were used "in order to compel" the United States "to do or abstain from doing an act."[7]

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[7] In its reply brief, Iraq argues for the first time that there is a factual dispute as to whether those plaintiffs who were forced into hiding in Iraq and Kuwait were hostages as that term is defined in the FSIA, and that limited discovery is necessary to resolve this issue. Def.'s Reply (Civ. No. 01-2674), at 4-5. The court disagrees that discovery is needed at this time, for in cases where a jurisdictional determination is "inextricably intertwined with the merits of the case," that determination should be postponed until "the merits are heard." *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 198 (D.C. Cir. 1992); *see also Lawrence v. Dunbar*, 919 F.2d 1525, 1530 (11th Cir. 1990). This is such a case, given that a showing that plaintiffs were held hostage would resolve the merits of this case. *See Green v. Hill*, 954 F.2d 694, 697 (11th Cir. 1992) ("Jurisdiction and the

For these reasons, the court agrees with Judge Jackson's legal conclusion in the *Hill* litigation—litigation involving identical allegations as those found here—that "American citizens denied permission to leave Kuwait and Iraq from August through mid-December, 1990," including those who took refuge in safehouses and diplomatic properties, were "'hostages' within the meaning of the FSIA" because they were "kept against their will," were "unable to move about freely," and were used "as bargaining commodities—to extract concessions from the United States and its coalition allies in exchange for their release." *Hill*, 175 F. Supp. 2d at 39, 46-47.

In reaching this decision, the court finds comfort in the fact that the position of the executive branch of the United States government at the time of the Kuwait invasion was that the Americans detained in Kuwait and Iraq were, in fact, "hostages" because they were being used by Hussein as leverage to prevent the United States and its allies from attacking Iraq and liberating Kuwait. *See Vine* TAC ¶ 15; *see also* Andrew Rosenthal, *Bush Vows Not to be Cowed by the Taking of "Hostages"; Iraq Shifts them to Targets*, N.Y. TIMES, Aug. 21, 1990, at A1 (quoting President George H.W. Bush as stating that, when referring to those American trapped in Kuwait and Iraq, because "Saddam Hussein specifically offers to trade the freedom of those citizens . . . he holds against their will in return for concessions, there can be little doubt that whatever these innocent people are called, they are in fact hostages"). Although not binding on this court, the executive branch's view is owed some deference. *Cf.*

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merits are intertwined if a decision on one would effectively decide the other.").

Sumitomo Shoji Am. v. Avagliano, 457 U.S. 176, 185-86 (1982) ("[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."). Moreover, in another context, Congress afforded "hostage status" to all U.S. citizens trapped inside Iraq or Kuwait who were "held in custody by governmental or military authorities" of Iraq or who took "refuge within [Iraq or Kuwait] in fear of being taken into such custody." Pub. L. No. 101-513, Tit. V, § 599C, 104 Stat. 1979, 2065 (Nov. 5, 1990).

Having concluded that this court may exercise subject matter jurisdiction over the claims of *all* plaintiffs against Iraq in this consolidated matter, the court will proceed to address Iraq's other arguments in favor of dismissal.

C. The Political Question Doctrine

Iraq argues that this case presents a non-justiciable political question. The political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).[8] While the "propriety of what may be done in the exercise of

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[8] For example, the Supreme Court has held that the following foreign policy issues are non-justiciable political questions: a determination of when war begins or when a war ends, *Commercial Trust Co. v. Miller*, 262 U.S. 51, 57 (1923); recognition of foreign governments, *United States v. Belmont*, 301 U.S. 324, 328 (1937); questions concerning the diplomatic status of individuals claiming immunity, *In re Baiz*, 135 U.S. 403, 431-32 (1890); and the ratification and interpretation of treaties, *Terlinden v. Ames*, 184 U.S. 270, 286 (1902).

[foreign relations] is not subject to judicial inquiry or decision," *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918), "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962). Iraq suggests that the question of its liability in these cases likewise presents a non-justiciable political question, primarily because any decision to award plaintiffs compensation would undermine the efforts of the President and Congress "to create a stable Iraq." Def.'s Mot. (Civ. No. 01-2674) at 31. The court disagrees.

This case does not require an evaluation of any executive or congressional policy decision or value judgment. Rather, it involves the liability of a foreign sovereign under a well-defined statutory scheme—a statutory scheme that was enacted by both houses of Congress and signed by the President. "[G]iven the fact that both the Executive and Legislative Branches have expressly endorsed the concept of suing terrorist [states] in federal court, . . . resolution of this matter will not exhibit 'a lack of respect due coordinate branches in government.'" *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 50 (2d Cir. 1991) (quoting *Baker*, 369 U.S. at 217) (holding that the political question doctrine does not apply to claims under the Anti-Terrorism Act for acts of terrorism perpetrated by the PLO).

Moreover, the efforts of the government to rebuild Iraq, simply put, are irrelevant to a determination of Iraq's liability under FSIA. Congress explicitly gave the courts jurisdiction over claims where the defendant, a foreign sovereign, was designated as a state sponsor of terrorism "at the time the act occurred." 28 U.S.C. § 1605(a)(7)(A). By focusing on

the foreign sovereign's designation at the time the act occurred, as opposed to when the suit is pending, Congress chose to allow a plaintiff to pursue claims against even those foreign nations whose sponsorship of terrorism ceases. For these reasons, the court declines to "convert what is essentially an ordinary tort suit into a non-justiciable political question" merely because its claims "arise in a politically charged context." *Klinghoffer*, 937 F.2d at 49.

D. Statute of Limitations

Actions brought under § 1605(a)(7) are subject to a statutory ten-year limitations period. *See* 28 U.S.C. § 1605(f) ("No actions shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose."). Congress, however, explicitly mandated that "[a]ll principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating the limitations period." *Id.* Iraq insists that all three complaints in this consolidated matter are time-barred because none of the plaintiffs filed their complaint within ten years of the date on which their causes of action arose—according to Iraq, by December 9, 1990, at the latest—and because equitable tolling, when properly applied, does not save the complaints. Although this issue is a close one, the court agrees with Iraq in part and concludes that the *Simon* and *Seyam* complaints were not timely filed.

Despite the fact that plaintiffs' injuries all occurred more than ten years before any of the complaints at issue were filed, plaintiffs nevertheless insist that their complaints are timely because the statute of

limitations on their claims did not begin to run until April 1996, when Congress added the state-sponsored terrorism exception to FSIA. *See* Pls.' Opp'n (Civ. No. 01-2674) at 12 n.4; Pls.' Opp'n (Civ. No. 03-691) at 3-6; Pls.' Opp'n (Civ. No. 03-888) at 3-6. The *Vine* plaintiffs base this suggestion on the principle that "no cause of action generally accrues until the plaintiff has the right to enforce his cause." *See* Pls.' Opp'n (Civ. No. 01-2674) at 12 n.4 (quoting *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1458 (5th Cir. 1972)). This argument, however, confuses what it means for a cause of action to "arise" and what it means for a cause of action to "accrue," a distinction important to this case. A claim "arises" on the date that the action in question occurred, yet does not "accrue" until a prior disability to suit is removed. *See Heinrich v. Sweet*, 118 F. Supp. 2d 73, 79-80 (D. Mass. 2000) (explaining the "subtle, yet important, difference between the two words"); *see also Kaplan v. Shure Bros.*, 153 F.3d 413, 422 (7th Cir. 1998) ("[A] cause of action can 'arise' before it 'accrues.'); *Van Den Hul v. Baltic Farmers Elevator Co.*, 716 F.2d 504, 510 n.4 (8th Cir. 1983) (noting that "in certain contexts, the words 'accrue' and 'arise' have significantly different meanings."); *Abramson v. P.J. Currier Lumber Co.*, 2001 U.S. Dist. LEXIS 1039, at *2-3 (D.N.H. Jan. 17, 2001) ("The point at which a cause of action 'arises' can be different from the point at which it 'accrues.'"). Given this distinction, plaintiffs' argument that the statute of limitations did not begin to run until 1996 must be rejected, for, according to FSIA, the statute of limitations began when their cause of action "arose," i.e., when the

action in question occurred.[9] Plaintiffs' complaints make clear that the actions in question occurred, and therefore their cause of action arose, by December 9, 1990, at the latest.

Having determined that plaintiffs' claims arose, at the latest, in December 1990, plaintiffs had until December 2000 to file their complaint, absent tolling. None of the complaints in this consolidated matter were filed by that date; the complaint in *Vine*, Civ. No. 01-2674, was filed on December 27, 2001; the

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[9] The *Simon* and *Seyam* plaintiffs cite a number of cases that assertedly stand for the proposition that Congress specifically allowed for the bringing of suits, absent tolling, up to ten years from the date of *enactment* of the state-sponsored terrorism exception, rather than ten years from the date the cause of action arose. Pls.' Opp'n (Civ. No. 03-691) at 3-6; Pls.' Opp'n (Civ. No. 03-888) at 3-6. The court notes that the overwhelming majority of the cases cited involve default judgments, for which any statute of limitations argument was necessarily waived. In only three of those cases was the statute of limitations even mentioned, and those references are dicta given the procedural posture of the case. *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 60 (D.D.C. 2003); *Polhill v. Islamic Republic of Iran*, 2001 U.S. Dist. LEXIS 15322, at *13 n.3 (D.D.C. Aug. 23, 2001); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 68-69 (D.D.C. 1998). In one of the two cases cited by plaintiffs that was not decided by default, the defendant failed to raise the statute of limitations defense and therefore waived it as well. *Kilburn v. Republic of Iran*, 277 F. Supp. 2d 24 (D.D.C. 2003). Finally, in the sole disputed matter cited by plaintiffs in which the statute of limitations was raised, the court recognized that the statute of limitations began to run at the time the underlying acts occurred, but were tolled until immunity was waived. *Wyatt v. Syrian Arab Republic*, 2005 U.S. Dist. LEXIS 21744, at *35 (D.D.C. 2005).

In sum, the cases cited by the *Simon* and *Seyam* plaintiffs are insufficient to convince this court that the statute of limitations on plaintiffs' claims did not begin to run when 28 U.S.C. § 1605(f) says they did, i.e., when "the cause of action arose."

complaint in Simon, Civ. No. 03-691, was filed on March 18, 2003; and the complaint in *Seyam,* Civ. No. 03-888, was filed on April 15, 2003. Accordingly, the court must analyze whether any "principle[] of equitable tolling" acts to extend the period for filing, such that plaintiffs' claims are not time-barred.

Importantly, the D.C. Circuit has held that equitable tolling "does not bring about an automatic extension of the statute of limitations by the length of the tolling period." *Phillips v. Heine*, 984 F.2d 489, 492 (D.C. Cir. 1993) (citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir. 1990)). Rather, under *Phillips*, even where a plaintiff establishes circumstances justifying equitable tolling, the plaintiff is given extra time to file a claim "*only* if he needs it." *Id.* (emphasis in original). If, however, the plaintiff does not "need it, there is no basis for depriving the defendant of the protection of the statute of limitations.'" *Id.* (quoting *Cada*, 920 F.2d at 452). Therefore, in order to "advance [the] important interests in evidentiary accuracy and repose," a deadline will only be tolled "by a reasonable period after the tolling circumstance [is] mended." *Id.*; *see also Chung v. Dep't of Justice*, 333 F.3d 273, 279 (D.C. Cir. 2003) (stating that equitable tolling "merely ensures that the plaintiff is not, by dint of circumstances beyond his control, deprived of a 'reasonable time' in which to file suit.").

Applying these principles, the D.C. Circuit held in *Phillips* that a plaintiff is not entitled to the benefit of the equitable tolling doctrine when the limitations period has not run by the time the plaintiff discovers all the facts necessary to support her claim. For example, in *Phillips*, the plaintiff discovered the necessary facts on February 26, 1990, and the

statute of limitations, without any tolling, expired on March 21, 1990. *Id.* Because nothing had prevented the plaintiff "from gathering information in the preceding years," and because "more than three weeks remained" in the limitations period after all the necessary facts were discovered, the D.C. Circuit questioned whether there was "any need to extend the statute at all." *Id.* Accordingly, the D.C. Circuit affirmed the district court's decision to dismiss the case on the ground that it was time-barred. *Id.*; *see also Cada*, 920 F.2d at 453 ("When as here the necessary information is gathered after the claim arose but before the statute of limitations has run, the presumption should be that the plaintiff could bring suit within the statutory period and should have done so.").

As noted above, FSIA was amended in 1996 to allow a plaintiff to pursue a claim against a foreign state for its involvement in certain acts of terrorism. *See* 28 U.S.C. § 1605(f). In doing so, Congress specifically stated that the ten-year limitations period was tolled for "the period during which the foreign state was immune from suit." However, because more than four years remained in the limitations period at the time Iraq's immunity was abrogated, the "presumption" that plaintiffs could have brought suit "within the statutory period" applies. *See Cada*, 920 F.2d at 452; *Phillips*, 984 F.2d at 492. Accordingly, under D.C. Circuit precedent, the fact that Iraq was immune from suit for the first six years of the statutory period applicable to plaintiffs' claims does not give rise to any equitable reason to toll the statutory deadline.[10]

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[10] The court recognizes that Judge Urbina concluded, in *Wyatt v. Syrian Arab Republic*, 2005 U.S. Dist. LEXIS 21744, at

Another principle of equitable tolling, however, *is* applicable here. In 1974, the Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties to the suit had the suit been permitted to continue as a class action." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553-54 (1974); *see also Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983) (affirming that *American Pipe* tolling applies to all asserted members of the class, regardless of whether they choose to file their own suits or to intervene in the pending action).

As described previously, the *Hill* litigation before Judge Jackson was a putative class action whose class, had class certification been granted, would have included all of the plaintiffs in these consolidated matters.[11] As such, *American Pipe*

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*35 (D.D.C. 2005), that a plaintiff was allotted a full ten years after the tolling period to bring her claim under FSIA. As discussed above, this court disagrees, and believes that such a conclusion is inconsistent with the D.C. Circuit's holding in *Phillips*.

[11] Iraq argues that the claims of the "plaintiffs in hiding" were not part of the putative class in *Hill* and thus cannot get the benefit of *American Pipe* tolling. Def.'s Mot. (Civ. No. 01-2674) at 11. The class in *Hill* was described to include "[a]ll American citizens who were present in Iraq or Kuwait at any time between August 2, 1990 through December 1990 and who, during that period, were taken hostage by Defendant." *Id.* (quoting *Hill* Compl. ¶ 41). Therefore, a determination of whether the "plaintiffs in hiding" are included in this class description turns on whether those plaintiffs were "hostages." As the court has already determined that they were, *supra* at 10, Iraq's argument that they may not benefit from *American Pipe* tolling is rejected.

tolling applies.[12] The *Hill* litigation was filed on December 15, 1999, before the statute of limitations expired. On June 29, 2001, Judge Jackson denied the *Hill* plaintiffs' motion for class certification.[13]

Iraq also argues that the claims of the plaintiffs' spouses cannot benefit from the full 18-month period that the motion for class certification in *Hill* was pending, given that their claims were not added until more than seven months after the original *Hill* complaint was filed. This fact, according to Iraq, reduces the *American Pipe* tolling period for the plaintiffs' spouses to a total of eleven months, a period of time assertedly insufficient to make the plaintiffs' spouses claims timely. This argument, however, fails to recognize that amendments adding a spouse's claim for loss of consortium relate back to the date on which the underlying claim was filed. *See, e.g.*, *Costello v. Balzarini*, 2005 U.S. Dist. LEXIS 10392, at *4 (D. Vt. May 24, 2005); *Hoch v. Venture Enters., Inc.*, 473 F. Supp. 541, 542 (D.V.I. 1979); *see also* CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1688 (3d ed. 2001). Moreover, this argument is ultimately irrelevant, given that the court concludes, *infra*, that plaintiffs are not entitled to an automatic extension of the statutory period equal to the time the motion for class certification was pending.

[12] Iraq notes that *American Pipe* tolling typically does not apply to class claims in subsequent class actions. The court makes no findings with regard to the viability of plaintiffs' class claims, reserving such a determination until a motion for class certification is ripe. However, the court does note that all plaintiffs' *individual* claims are subject to *American Pipe* tolling, notwithstanding the fact that they also filed class claims. *See, e.g.*, *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988); *Korwek v. Hunt*, 827 F.2d 874, 878 (2d Cir. 1987); *In re Crazy Eddie Sec. Litig*, 747 F. Supp. 850, 856 (E.D.N.Y. 1990).

[13] In a later filed memorandum opinion, Judge Jackson explained that class certification was denied "in light of the fact that the case was proceeding by default; the uncertainty of the numbers of U.S. citizens who could actually qualify as a victim or claimant; and the significant variations in the experiences of

Plaintiffs insist that the statutory deadline was tolled thereafter for eighteen months and fourteen days—an amount of time equal to the time that the class certification issue was pending—until late 2003. Iraq disagrees, contending that under the holding in *Phillips*, plaintiffs' claims were only equitably tolled for a reasonable amount of time after the class certification issue was resolved, and that by taking almost six months to file their complaint, plaintiffs' delay was unreasonable.

The court agrees with Iraq's legal argument and concludes that the holding in *Phillips*—that "equitable tolling . . . merely ensures that the plaintiff is not, by dint of circumstances beyond his control, deprived of a 'reasonable time' in which to file suit." *Chung*, 333 F.3d at 279—applies equally to *American Pipe* tolling as well. That is, a plaintiff who would have been a member of a class action, had it been certified, does not receive an automatic extension of the statute of limitations by the length of time that the class certification issue is pending. Instead, the deadline is tolled only "by a reasonable period after the tolling circumstance [is] mended." *Phillips*, 984 F.2d at 492. This conclusion inevitably flows from the D.C. Circuit's holding that equitable tolling does not provide an automatic extension of a statute of limitations and the Supreme Court's recognition that *American Pipe* tolling is a type of equitable tolling, *see Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 n.3 (1990) (citing *American Pipe* as an example of equitable tolling).

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the hostages, including hardships endured and compensable injuries suffered." 175 F. Supp. 2d at 39 n.5.

While the court agrees with Iraq's legal argument, it disagrees with its factual suggestion that six months was an unreasonable amount of time for the *Vine* plaintiffs to have waited to file their complaint. A number of factors lead this court to this conclusion. First, the *Vine* plaintiffs suggest that Judge Jackson's class certification decision was not "definitive," and that he later encouraged them to "continue to pursue class certification, which he said he would . . . be inclined to grant" had he retained the case. Pls.' Opp'n (Civ. No. 01-2674) at 16-17. Iraq never disputes this claim. Second, and perhaps most importantly, for the eighteen months the class certification motion was pending, and for six months thereafter, Judge Jackson consistently and regularly allowed plaintiffs to amend their complaint to add more named plaintiffs. Under the doctrine of relation back, as embodied in Rule 15(c) of the Federal Rules of Civil Procedure, the claims of these additional plaintiffs "relate back" to the date of the original complaint for purposes of conducting any statute of limitations analysis. *See Leachman v. Beech Aircraft Corp.*, 694 F.2d 1301, 1308 (D.C. Cir. 1982); *Miller v. Air Line Pilots Ass'n*, 2000 U.S. Dist. LEXIS 8797, at *9 (D.D.C. Mar. 30, 2000). In light of Judge Jackson's pattern of granting such motions to amend, a plaintiff with a similar claim could reasonably have expected to seek compensation for their injuries by participating in the *Hill* litigation. However, in early December 2001, Judge Jackson indicated that he would not allow any more plaintiffs to be added to the *Hill* matter. Within three weeks, the *Vine* plaintiffs filed their complaint in Civil Action No. 01-2674. Given this procedural history, the court believes that the *Vine* plaintiffs acted diligently and filed their complaint within a reasonable time of

discovering that they could not be added to the *Hill* litigation. Accordingly, the court believes that equitable tolling is appropriate and their claims are timely.[14]

The plaintiffs in *Simon* and *Seyam*, however, were not so diligent. They waited until 2003 to file their complaint, almost two years after Judge Jackson denied class certification in *Hill* and more than a year after he indicated in writing that he would not allow any more plaintiffs to join the *Hill* litigation. Under the principles espoused in *Phillips*, this length of time exceeds what was reasonably necessary and, therefore, precludes the application of equitable tolling. Accordingly, the complaints in *Simon* and *Seyam* are time-barred and must be dismissed.

E. Failure to State a Claim

In their third amended complaint, the *Vine* plaintiffs assert a claim based on federal statutory law, three claims based on federal common law, three claims based on state common law, and four claims based on foreign law. Iraq insists that these claims are either not legally cognizable or are not applicable to the facts at hand, and accordingly moves to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[15] Based on the following

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[14] The *Vine* plaintiffs have amended their complaint three times and have moved to add additional plaintiffs on at least two other occasions. As noted above, those plaintiffs' claims are timely under the doctrine of relation back. *Leachman*, 694 F.2d at 1308.

[15] A court may grant a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) 15 "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Martin v. Ezeagu*, 816 F. Supp. 20, 23 (D.D.C. 1993) (internal quotations omitted); *Conley v.*

analysis, the court agrees in part, and will dismiss the federal statutory and federal common law claims.

1. Federal Statutory Law

Count II of the *Vine* TAC alleges that Iraq violated the so-called Flatow Amendment, through which Congress created a specific cause of action against any "official, employee, or agent of a foreign state" for acts over which the court may maintain jurisdiction under the state-sponsored terrorism exception to sovereign immunity. 28 U.S.C. § 1605 note. The Flatow Amendment is not a statute of "general application" but instead, by its plain language, limits its scope to "officials or agents of foreign states." *Dammarell v. Islamic Republic of Iran*, 2005 U.S. Dist. LEXIS 5343, *93 (D.D.C. Mar. 29, 2005). Recognizing this limitation, the D.C. Circuit has held that neither the state-sponsored terrorism exception of FSIA, "nor the Flatow Amendment, nor the two considered in tandem, creates a private right of action against a foreign government." *Cicippio-Puleo*, 353 F.3d at 1033. As the sole defendant in the *Vine* matter is a foreign government, and not an official or agent of that foreign government, Iraq moves to dismiss the Flatow Amendment claim in the *Vine* TAC.

Gibson, 355 U.S. 41, 45-46 (1957) (stating that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). In addition, the court must construe the complaint in a light most favorable to the plaintiff and must accept as true all reasonable factual inferences drawn from well-pleaded factual allegations. *In re United Mine Workers Employee Benefit Plans Litig.*, 854 F. Supp. 914, 915 (D.D.C. 1994); *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979).

Despite the fact that the text of the Flatow Amendment does not directly create a cause of action against a government defendant, the *Vine* plaintiffs nonetheless argue that Iraq can be held liable indirectly, by way of § 1606 of FSIA. Section 1606 provides that, as to any claim for relief with respect to which a foreign state is not entitled to immunity, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606.[16] This judicial officer has previously rejected a similar argument and held that the Flatow Amendment should not be expanded to apply to foreign states through application of § 1606. *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 2006 U.S. Dist. LEXIS 58033, at *35-42 (D.D.C. May 11, 2006). In so holding, this court adopted the reasoned decision of Judge Bates in *Dammarell v. Islamic Republic of Iran*, who had provided four reasons why "the cause of action in the Flatow Amendment cannot be read to apply to foreign states through section 1606": (1) the text of the Flatow Amendment applies only to officials, employees, or agents of a foreign state, not a foreign state itself; (2) the legislative history does not contain any indication that Congress nonetheless intended to create a private cause of action against a foreign state; (3) the statute does not "obviously extend to *private individuals* within the meaning of section 1606," 2005 U.S. Dist. LEXIS 5343, at *97-98 (emphasis added); and (4) such a holding would be "in at least some tension with *Cicippio-Puleo*," *id.* at 97; *see also Holland*, 2005 U.S. Dist. LEXIS 40254,

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[16] The effect of section 1606 on the liability of foreign states under the Flatow Amendment was not explicitly addressed in *Cicippeo-Puleo*.

at *41-44 (Kollar-Kotelly, J.) (similarly adopting Judge Bates's reasoning in *Dammarell* and refusing to hold a foreign government liable under the Flatow Amendment).[17]

Today, this court reiterates its agreement with Judge Bates and Judge Kollar-Kotelly and again concludes that Congress did not intend to create a cause of action under the Flatow Amendment against foreign states through § 1606 of FSIA. As the D.C. Circuit has stated, "it is for Congress, not the courts, to decide whether a cause of action should lie against foreign states." *Cicippio-Puleo*, 353 F.3d at 1036. In situations where "Congress has not expressly recognized" a cause of action against foreign states, courts should "decline to imply" one. *Id* Accordingly, the court dismisses the *Vine* plaintiffs' claim against Iraq under the Flatow Amendment.

2. Federal Common Law

Additionally, Iraq argues that the three federal common law claims found in Counts I, VI, and VII must also be dismissed for failure to state a claim. The *Vine* plaintiffs disagree, contending that "it is plain that the complaint states a viable federal common law cause of action against Iraq" in light of the recent decision by the Supreme Court in *Sosa v.*

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[17] The court notes that Judge Jackson, in *Dodge v. Islamic Republic of Iran*, reached a contrary conclusion and held, without elaboration, that a plaintiff, pursuant to section 1606, may sue a foreign state "under *any* cause of action arising from common law, foreign law, or federal statute which might ordinarily give rise only to individual liability," including the Flatow Amendment. 2004 U.S. Dist. LEXIS 29045, at *12 (D.D.C. Aug. 25, 2004) (emphasis added).

Alvarez-Machain, 542 U.S. 692 (2004). Pls.' Opp'n (Civ. No. 01-2674) at 32.

In *Pugh*, this court discussed at length, and rejected, the argument that federal common law provides a viable cause of action against a foreign sovereign under FSIA. *See Pugh*, 2006 U.S. Dist. LEXIS 58033, at *42-49. Specifically, this court noted that, in 2003, the D.C. Circuit "strongly signaled that a federal common law of tort is incompatible with section 1606 of FSIA . . . because section 1606 'instructs [courts] to find the law, not to make it.'" *Id.* at *45 (quoting *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 338 (D.C. Cir. 2003)). As such, the D.C. Circuit's holding "reflect[ed] the modern rule that the federal common law should only be employed in the rarest of circumstances." *Id.* (quoting *Dammarell*, 2005 U.S. Dist. LEXIS 5343, at *78); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 6.1, at 354 (4th ed. 2003) ("There long has been a strong presumption against the federal courts fashioning common law to decide cases.").

Moreover, this court also rejected the argument that the *Pugh* plaintiffs' allegations fell "within the narrow category of cases that the Supreme Court has recently pronounced to be actionable" in *Sosa*, in large part because *Sosa* arose in the context of the Alien Tort Claims Act ("ATCA"), and not FSIA. *Pugh*, 2006 U.S. Dist. LEXIS 58033, at *47. That difference was "fatal" to the *Pugh* plaintiffs' argument. *Id.* Because FSIA, unlike the ATCA, details "'precisely the sort of claims that a plaintiff may bring when suing under a waiver of immunity provided by the FSIA,'" *id.* (quoting *Dammarell*, 2005 U.S. Dist. LEXIS 5343, at *90), the justification for exercise of federal common law was absent. *Id.* (citing 19

CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4514, at 480-81 (2d ed. 1996) ("Insofar as one important justification for the exercise of federal common law is that Congress has not spoken on the matter before the court, that justification is removed once Congress has spoken on a particular matter.")); *see also City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) (stating that the Supreme Court has "always recognized that federal common law is subject to the paramount authority of Congress" and may be resorted to only "[in] absence of an applicable Act of Congress") (internal quotations and citations omitted). Because Congress had spoken on the particular matter at issue, by enacting section 1606 of FSIA, this court denied the plaintiffs' request to fashion a cause of action against Iraq under federal common law. *Pugh*, 2006 U.S. Dist. LEXIS 58033, at *48.

The logic in *Pugh* is equally applicable to this matter. Congress has addressed the claims that are available against a foreign country whose immunity has been waived, by enacting FSIA, and therefore this court may not resort to federal common law. Accordingly, plaintiffs' federal common law claims are dismissed.

3. State Common Law and Foreign Law Claims

In Counts III through IX, the *Vine* plaintiffs asserts three state common law claims—false imprisonment, intentional infliction of emotional distress, and loss of consortium—and four claims based on the law of Iraq and Kuwait. In the wake of the D.C. Circuit's opinion in *Cicippio-Puleo*, district courts in this jurisdiction have uniformly held that state or foreign law may be used to hold foreign states liable for acts

of terrorism. *See, e.g.*, *Holland*, 2005 U.S. Dist. LEXIS 40254, at *63-65; *Price v. Socialist People's Libyan Arab Jamahiriya*, 384 F. Supp. 2d 120, 132 (D.D.C. 2005); *Dammarell*, 2005 U.S. Dist. LEXIS 5343, at *55-56.

Iraq contends that these cases are in error, suggesting that Congress preempted state and foreign law by enacting the Flatow Amendment. Def.'s Mot. (Civ. No. 01-2674) at 23-25. Iraq's argument is untenable, for as other courts in this jurisdiction have held, neither the text nor the legislative history of the Flatow Amendment supports the assertion that the Congress intended to "occupy the field" to the exclusion of state or foreign law. *Dammarell*, 2005 U.S. Dist. LEXIS 5343, at *50-53. Rather, "[f]ar from *preempting* state law in section 1605(a)(7) cases, the FSIA *invites*" the application of state and foreign law "through section 1606." *Id.* at *51 (emphasis in original); *see also Holland*, 2005 U.S. Dist. LEXIS 40254, at *51-52; *Price*, 384 F. Supp. 2d at 132-33. Accordingly, the court denies Iraq's motion to dismiss the *Vine* plaintiffs' state common law and foreign law claims.[18]

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[18] In each of the cases cited above, the courts recognized that foreign law was an available avenue of relief under FSIA, but determined, after applying choice of law principles to the facts at hand, that application of state law was more appropriate. This court makes no finding as to whether state law or foreign law should be applied in this case, but rather simply concludes that neither are preempted by the Flatow Amendment. Any choice of law analysis will have to wait until after the parties have briefed the issue.

III. CONCLUSION

For the aforementioned reasons, it is this 7th day of September, 2006, hereby

ORDERED that Iraq's Motion to Dismiss in Civil Action 01-2674 [#44] is **GRANTED**

IN PART and **DENIED IN PART**, as set forth in this Memorandum Opinion; and it is further

ORDERED that Counts I and II of the Third Amended Complaint in Civil Action

01-2674 are **DISMISSED**;

ORDERED that Iraq's Motion to Dismiss in Civil Action 03-691 [#14] is **GRANTED**;

and it is further;

ORDERED that Iraq's Motion to Dismiss in Civil Action 03-888 [#14] is **GRANTED**.

Henry H. Kennedy, Jr.
United States District Judge

125 (13) (19)

Nos. 07-1090 & 08-539

IN THE

Supreme Court of the United States

REPUBLIC OF IRAQ,
Petitioner,
v.
JORDAN BEATY, et al.,
Respondents.

REPUBLIC OF IRAQ, et al.,
Petitioners,
v.
ROBERT SIMON, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONS FOR WRITS OF CERTIORARI FILED
FEB. 19, 2008 (07-1090) AND OCT. 22, 2008 (08-539)
CERTIORARI GRANTED JANUARY 9, 2009

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APPENDIX T

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBIN BEATY, et al., **Plaintiffs,** **v.** **REPUBLIC OF IRAQ,** **Defendant.**	**Civil Action No. 03-0215 (JDB)**

MEMORANDUM OPINION

United States citizens Kevin Beaty and William Barloon were detained and allegedly held as hostages by the former Iraqi regime in the 1990s. Along with other former detainees and their spouses, Beaty and Barloon filed suit against Iraq in 1996, eventually obtaining a default judgment against it. *See Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001) ("*Daliberti II*"); *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38 (D.D.C. 2000) ("*Daliberti I*"). The plaintiffs in this case—Jordan Beaty, Austin

Makenzie Beaty, William R. Barloon, Bryan C. Barloon, and Rebecca L. Barloon—are the children of Kevin Beaty and William Barloon. Invoking the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(7), plaintiffs seek damages against Iraq for the emotional distress that they allegedly suffered during their fathers' captivity.

Iraq has filed a motion to dismiss in which it asserts that plaintiffs have failed to state a claim upon which relief can be granted, that this Court lacks subject-matter jurisdiction, and that plaintiffs' claims are either nonjusticiable or preempted because of their potential to undermine United States foreign policy. The United States has submitted a statement of interest reaffirming its position that actions taken by the political branches after the filing of the original complaint divest this Court of jurisdiction. For their part, plaintiffs maintain that recent decisions of the D.C. Circuit and this Court establish that there is a jurisdictional basis for their suit, that their claims are justiciable, and that they are entitled to partial summary judgment based on the facts established in the *Daliberti* case. Pending before the Court are defendant's motion to dismiss and plaintiffs' motion for partial summary judgment. For the reasons set forth below, the Court will grant in part and deny in part both motions.

BACKGROUND

The facts underlying the detention and captivity of Beaty and Barloon are recounted at length in the two reported decisions in the *Daliberti* litigation, *see* 146 F. Supp. 2d at 21-23; 97 F. Supp. 2d at 41-42, and have not been disputed here. (These facts are drawn

from plaintiffs' Third Amended Complaint, as well as the *Daliberti* opinions, of which this Court may take judicial notice. *See Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229, 263 (D.D.C. 2006); *Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105, 109 n.6 (D.D.C. 2005). Beaty and Barloon resided in Kuwait and worked in civilian capacities following the conclusion of the Persian Gulf War in 1991. Beaty worked as a drilling supervisor on an oil rig, and Barloon supervised aircraft maintenance and overhaul. Third Am. Compl. ¶ 7. In April of 1993, Beaty was detained by Iraqi border guards and taken at gunpoint first to Basra and later to Baghdad. *Id.* at ¶¶ 9-11. For a period of 205 days, Beaty lived in squalid conditions in two Iraqi prisons, where he was deprived of food and water, as well as medication for his heart condition. *Id.* at ¶¶ 10-11. Iraq conditioned Beaty's release on either the lifting of the economic sanctions that had been imposed upon it or a significant monetary ransom. *Id.* at ¶ 12. Only after efforts by Beaty's wife Robin and prominent political figures, including former President Jimmy Carter and then-Oklahoma Senator David Boren, did Iraq release Beaty. *Id.* at ¶¶ 12-13.

Barloon was detained by an Iraqi border guard in March of 1995. *Id.* at ¶ 14. Like Beaty, he was transported first to Basra and then to Baghdad, where, again like Beaty, he was eventually held at the now infamous Abu Ghraib prison. *Id.* at ¶ 16. During his 126 days of detention, Barloon was deprived of food, water, and other necessities. *Id.* at ¶ 17. His captors beat him and, on one occasion, subjected him to a mock execution. *Id.*; *see Daliberti II*, 146 F. Supp. 2d at 23. Diplomatic efforts by the

Clinton Administration, and in particular the intervention of then-Congressman Bill Richardson, led to Barloon's release in late 1995. Third Am. Compl. ¶¶ 18-20.

Beaty and Barloon, joined by their wives, two other detainees, and those detainees' spouses, filed suit against Iraq in May of 1996. The four men sought damages for kidnapping, false imprisonment, and torture; their wives sought recovery for intentional infliction of emotional distress and loss of consortium. *See Daliberti I*, 97 F. Supp. 2d at 41-42. The jurisdictional basis for the suit was provided by legislation that Congress had enacted just weeks earlier: section 221(a) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* Pub. L. 104-132, § 221(a), 110 Stat. 1214, 1242-43 (April 24, 1996). A key provision in that legislation deprived countries designated as state sponsors of terrorism of sovereign immunity from suits seeking money damages "for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency." *Id.* (codified at 28 U.S.C. § 1605(a)(7)).

After the Clerk of the Court entered default against it, Iraq appeared by counsel and filed a motion to dismiss the civil suit. *Daliberti I*, 97 F. Supp. 2d at 42. Judge Friedman concluded that the plaintiffs had "met their burden of showing that the actions they complain of fall under the state sponsored terrorism exception to foreign sovereign immunity in 28 U.S.C.

1607(a)(7)," specifically by demonstrating that they had been the victims of "torture" and "hostage taking"—two of the acts enumerated in the statute. *Id.* at 45-46. He also rejected Iraq's contentions that the state-sponsored terrorism exception is unconstitutional and that adjudication of the suit was barred by the act-of-state doctrine. *Id.* at 48-55. Accordingly, he denied Iraq's motion to dismiss. After its motion was denied, Iraq's counsel withdrew from the case, and the Clerk of the Court once again entered default against Iraq. The case was then transferred to Judge Oberdorfer, who conducted a four-day bench trial, issued findings of fact, and entered final judgment in favor of the plaintiffs. *Daliberti II*, 146 F. Supp. 2d at 21. That judgment awarded millions of dollars in damages to the male plaintiffs for the physical hardships suffered during their captivity and their psychological problems since release, as well as millions of dollars to the men's wives for "loss of the society and companionship of their husbands." *Id.* at 24, 26-27.

Not covered by the *Daliberti* judgment, however, were the Beaty and Barloon children. Those five children, plaintiffs here, filed a complaint in February of 2003 seeking monetary damages for the "mental anguish, pain and suffering during the period of their fathers' incarceration." Compl. ¶ 10. (The filing of their complaint almost two years after the *Daliberti* judgment was not just happenstance: a ten-year statute of limitations governs cases brought under § 1605(a)(7), *see* 28 U.S.C. § 1605(f), and Beaty's detention and captivity began and ended in 1993.) But shortly after plaintiffs filed their complaint, events outside and inside the courthouse dramatically altered the existing legal and political

landscape. A United States-led coalition commenced a military invasion of Iraq on March 20, 2003, eventually toppling the regime headed by Saddam Hussein. In support of the war effort, Congress passed the Emergency Wartime Supplemental Appropriations Act ("EWSAA"), Pub. L. No. 108-11, 117 Stat. 559 (2003). The EWSAA provided funding for military operations in Iraq and homeland security measures in the United States. It also gave the President the authority to suspend certain laws that had barred aid to Iraq and to "make inapplicable with respect to Iraq . . . any other provision of law that applies to countries that have supported terrorism." Pub. L. No. 108-11, § 1503, 117 Stat. at 579. President George W. Bush exercised the authority granted by Congress when he issued Presidential Determination 2003-23 on May 7, 2003. Echoing the language of the EWSAA, the Presidential Determination purported to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 . . . and any other provision of law that applies to countries that have supported terrorism." 68 Fed. Reg. 26,459 (May 7, 2003). The President explained in a message to Congress the following week his understanding that the laws made "inapplicable" to Iraq in Presidential Determination 2003-23 included 28 U.S.C. § 1605(a)(7), the state-sponsored terrorism exception to the FSIA. *See* 39 Weekly Comp. Pres. Doc. 647, 647-48 (May 22, 2003).

At virtually the same time that the political branches worked to adapt the laws to a changing political and military situation, the U.S. Court of Appeals for the D.C. Circuit was issuing a series of important rulings addressing unanswered questions

as to the contours of 28 U.S.C. § 1605(a)(7). One of those decisions, *Ciccipio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004), was issued shortly after the first status conference in this case. The court of appeals in *Ciccipio* resolved two questions of far-reaching significance in the FSIA context. It first held that § 1605(a)(7) confers subject-matter jurisdiction but "does not create a private right of action." *Id.* at 1034. A second key question related to the so-called Flatow Amendment, 28 U.S.C. § 1605 note, a provision passed in 1996 that allowed U.S. nationals injured or killed by acts of terrorism to seek money damages—including punitive damages—from officials or agents of foreign states designated as sponsors of terrorism. That provision, the court of appeals held, "creates a private right of action against officials, employees, and agents of foreign states," but this "cause of action is limited to claims against those officials in their *individual*, as opposed to their official, capacities." *Id.* In other words, the Flatow Amendment does not provide a cause of action against the foreign state itself. Because the plaintiffs in *Ciccipio* may have labored under the misconception that the Flatow Amendment provided just such a cause of action, the court of appeals remanded the case to give them "an opportunity to amend their complaint to state a cause of action under some other source of law, including state law." *Id.* at 1036.

In light of Presidential Determination No. 2003-23 and the D.C. Circuit's decision in *Ciccipio-Puleo*, this Court invited the United States to file a statement of interest expressing the government's position on subject-matter jurisdiction. Dkt. #4 (Order of

1/29/2004). The United States accepted the Court's invitation and submitted a brief in which it argued that the Presidential Determination, made pursuant to authority granted by Congress in the EWSAA, had restored Iraq's sovereign immunity effective immediately and that this Determination did not contain an exception (express or implied) for terrorism-related suits that had been filed prior to the passage of the EWSAA. *See* First Statement of Interest of the United States at 8, 12. To the extent that the Presidential Determination did not divest the Court of subject-matter jurisdiction, the United States maintained that plaintiffs' complaint suffered from the same defect as that of the plaintiffs in *Ciccipio-Puleo* and thus failed to state a claim, "at least as currently pled." *Id.* at 28.

Before this Court had the chance to evaluate the United States' main argument, the D.C. Circuit did so in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1010 (2005). The principal question in *Acree* was whether the language in § 1503 of the EWSAA authorized the President to make the state-sponsored terrorism exception to the FSIA inapplicable to Iraq. Answering that "exceedingly close question" in the negative, the *Acree* majority concluded that the phrase "any other provision of law that applies to countries that have supported terrorism," when read in context, "authorizes the President to make inapplicable to Iraq those provisions of law that impose economic sanctions on Iraq or that present legal obstacles to the provision of assistance to the Iraqi Government," but was "not intended to alter the jurisdiction of the federal courts under the FSIA". *Id.* at 51, 55. Section 1605(a)(7) of the FSIA,

the court held, was not a provision included within the Congressional grant of authority, and the President's exercise of power beyond that grant was thus without effect. *Id.* at 57. The court went on to conclude that the plaintiffs had nevertheless failed to state a claim upon which relief could be granted because, as in *Ciccipio-Puleo*, they had not "identif[ied] a particular cause of action arising out of a specific source of law." *Id.* at 59-60. Although agreeing with the majority that the plaintiffs' suit must be dismissed and that the statutory-construction issue presented a close question, then-Circuit Judge (now Chief Justice) Roberts would have accepted the United States' argument that § 1503 of the EWSAA granted the President authority to make 28 U.S.C. § 1605(a)(7) inapplicable to Iraq and that Presidential Determination 2003-23 "ousted the federal courts of jurisdiction in cases that relied on that exception to Iraq's sovereign immunity." *Id.* at 60, 62 (Roberts, J., concurring in part and concurring in the judgment). The United States, having secured on behalf of Iraq (which did not appear) dismissal of the plaintiffs' suit, did not seek further review of the statutory-interpretation issue before either the en banc D.C. Circuit or the U.S. Supreme Court.

Acree, along with the earlier decision in *Ciccipio-Puleo*, forced the parties to the present litigation to reassess their positions. Iraq entered an appearance through counsel. The United States submitted a second and, upon the Court's invitation, a third Statement of Interest. Plaintiffs filed a series of amended complaints designed to comply with *Ciccipio-Puleo*, culminating in a Third Amended Complaint. In the three-count complaint, plaintiffs

allege that they were aware of their fathers' captivity in Iraq, that they were able to see through media sources where their fathers were being held, and that they learned that their fathers were suffering mentally and emotionally. *See* Third Am. Comp. ¶ 22. Plaintiffs claim to have "endured severe mental anguish, depression, humiliation, anxiety, and pain and suffering as a direct result of their fathers' captivity." *Id.* at ¶ 21. They ground their prayer for money damages in three causes of action: intentional infliction of emotional distress under state common law (Count I), violations of customary international law incorporated into federal common law (Count II), and loss of solatium under federal common law (Count III). Plaintiffs contend that there are no disputed facts and that they are entitled to partial summary judgment. Iraq, backed in part by the United States, argues that plaintiffs' suit should be dismissed on jurisdictional and prudential grounds, or alternatively because plaintiffs have failed to state a valid claim. The parties ably advocated their positions at a motions hearing held on March 2, 2007, and their respective motions are now ripe for resolution.

STANDARDS OF REVIEW

Iraq seeks dismissal of plaintiffs' complaint on the grounds that it fails to state a claim upon which relief can be granted, that it presents a nonjusticiable political question, and that this Court lacks jurisdiction. The first of these three grounds constitutes a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure, whereas the latter two challenge subject-matter jurisdiction and must be evaluated under Rule 12(b)(1). *See, e.g.*, *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1262 (D.C. Cir.

2006) (political-question doctrine goes to subject-matter jurisdiction). "[I]n passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *see Leatherman v. Tarrant Cty. Narcotics and Coordination Unit*, 507 U.S. 163, 164 (1993); *Phillips v. Bureau of Prisons*, 591 F.2d 966, 968 (D.C. Cir. 1979). Therefore, the factual allegations must be presumed true, and plaintiffs must be given every favorable inference that may be drawn from the allegations of fact. *Scheuer*, 416 U.S. at 236; *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000). At the same time, courts need not accept as true "a legal conclusion couched as a factual allegation," nor inferences that are unsupported by the facts set out in the complaint. *Trudeau v. Federal Trade Comm'n*, 456 F.3d 178, 193 (D.C. Cir. 2006) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

Under Rule 12(b)(1), those seeking to invoke the jurisdiction of a federal court—plaintiffs here—bear the burden of establishing that the court has jurisdiction. *See US Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000); *see also Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001) (a court has an "affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority"). "'[F]actual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." *Grand Lodge*, 185 F. Supp. 2d at 13-14 (quoting 5A Charles Alan Wright & Arthur R. Miller,

Federal Practice and Procedure § 1350 (2d ed. 1987)). A court may consider material other than the allegations of the complaint in determining whether it has jurisdiction, so long as it still accepts the factual allegations in the complaint as true. *See Jerome Stevens Pharmaceuticals, Inc. v. Food and Drug Admin.*, 402 F.3d 1249, 1253-54 (D.C. Cir. 2005). Additionally, "[w]here the motion to dismiss is based on a claim of foreign sovereign immunity, which provides protection from suit and not merely a defense to liability . . . the court must engage in sufficient pretrial factual and legal determinations to satisfy itself of its authority to hear the case before trial." *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027-28 (D.C. Cir. 1997) (citation and quotation marks omitted).

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure will not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Haynesworth v. Miller*, 820 F.2d 1245, 1254 (D.C. Cir. 1987). All that the Federal Rules of Civil Procedure require of a complaint is that it contain "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (quoting *Conley*, 355 U.S. at 47). "Given the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514

(2002) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

Also pending is plaintiffs' motion for partial summary judgment. Summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine dispute of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party may successfully support its motion by "informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* (quoting Fed. R. Civ. P. 56(c)).

In determining whether there exists a genuine issue of material fact sufficient to preclude summary judgment, a court must regard the non-movant's statements as true and accept all evidence and make all inferences in the non-movant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A non-moving party, however, must establish more than the "mere existence of a scintilla of evidence" in support of its position. *Id.* at 252. By pointing to the absence of evidence proffered by the non-moving party, a moving party may succeed on summary judgment. *Celotex*, 477 U.S. at 322. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (internal citations

omitted). Summary judgment is appropriate if the non-movant fails to offer "evidence on which the jury could reasonably find for the [non-movant]." *Id.* at 252.

DISCUSSION

In moving to dismiss plaintiffs' complaint, Iraq has a number of arrows in its quiver. It first argues, largely with reference to legal and political developments since the United States-led invasion in 2003, that adjudication of plaintiffs' claims "would compromise critical U.S. foreign policy objectives," and that the case must therefore be dismissed. *See* Def.'s Opp'n and Reply at 5. Should the Court decline to dismiss the case on jurisdictional or related prudential grounds, Iraq maintains that plaintiffs' suit should be dismissed on the alternative and independent basis that they have failed to state a claim under the state and federal causes of action invoked in their complaint. *See* Def.'s Memorandum in Support of Motion to Dismiss ("Def.'s Mem.") at 14-19; Def.'s Opp'n and Reply at 24-29. Emphasizing that none of Iraq's arguments turns on factual disputes, plaintiffs maintain that they are entitled to partial summary judgment under applicable precedents that establish (1) that this Court has jurisdiction over their claims, and (2) that they have stated valid claims under state and federal common law.

A. Jurisdictional and Prudential Grounds for Dismissal

The FSIA provides the exclusive basis for obtaining jurisdiction over foreign countries in United States courts. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). Foreign states are "presumptively immune

from the jurisdiction of United States courts," which can assert jurisdiction only if one of the "specified exception[s]" to foreign sovereign immunity applies. *Id.* Plaintiffs in this case argue that jurisdiction lies under the statutory exception for state sponsors of terrorism. That exception divests foreign states of immunity from suits seeking money damages "for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act" where the perpetrator was "an official, employee, or agent of [the] foreign state [who was] acting within the scope of his or her office, employment or agency." 28 U.S.C. § 1605(a)(7). "In enacting this provision," the D.C. Circuit has explained, "Congress sought to create a judicial forum for compensating the victims of terrorism, and in so doing to punish foreign states who have committed or sponsored such acts and deter them from doing so in the future." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 88-89 (D.C. Cir. 2002).

Section 1605(a)(7) and its neighboring provisions specify which foreign states may be sued and under what circumstances. For one thing, jurisdiction under this section is available only for suits that seek money damages for injuries caused by certain enumerated types of conduct. The statute likewise instructs courts to locate the definitions for the types of qualifying conduct in specific sources. The phrase "hostage taking" at issue here, for example, is to be given the definition found in Article 1 of the International Convention Against the Taking of Hostages, *see* 28 U.S.C. § 1605(e)(2), which applies the term to "[a]ny person who seizes or detains and

threatens to kill, injure or continue to detain another person . . . in order to compel a third party . . . to do or abstain from doing any act as an explicit or implicit condition for release of the hostage." International Convention Against the Taking of Hostages, Dec. 17, 1979, art. 1, T.I.A.S. No. 11,081. Three additional conditions must be met before a party can obtain jurisdiction over a foreign state under the state-sponsored terrorism exception: (1) the foreign state must be one that was designated "as a state sponsor of terrorism . . . at the time the act occurred," (2) the foreign state must be afforded an opportunity to arbitrate claims based on acts that occurred in that state, and (3) the party or the victim must be a United States national. *See* 28 U.S.C. § 1605(a)(7)(A), (B); *see also Price*, 294 F.3d at 89; *Daliberti I*, 97 F. Supp. 2d at 44.

There is no dispute here that plaintiffs have satisfied these threshold conditions. (Indeed, Judge Friedman has already so ruled with respect to their parents. *See Daliberti I*, 97 F. Supp. 2d at 44-46.) Plaintiffs seek money damages arising from their fathers' detention and imprisonment at the hands of Iraqi officials. Such detention and imprisonment qualifies as "hostage taking" under these circumstances because Iraq used Beaty and Barloon as bargaining chips to extract concessions from the United States government. *See id.* at 46. At the time Iraq detained and held the men, it was designated as a state sponsor of terrorism. 55 Fed. Reg. 37,793 (Sept. 13, 1990); 31 C.F.R. § 596.201. Beaty and Barloon are United States nationals, as are their children, who attached an offer to arbitrate to their initial complaint in this case. Accordingly, plaintiffs have satisfied all of the prerequisites to obtaining

jurisdiction over a foreign state pursuant to the state-sponsored terrorism exception to the FSIA.

Iraq does not argue otherwise. It instead points to developments since the filing of the original complaint and to several legal doctrines that, it contends, counsel against adjudication of plaintiffs' suit. According to Iraq, dismissal is appropriate because (1) the President, acting pursuant to Congressional authorization, has restored Iraq's sovereign immunity for terrorist acts of the prior regime; (2) plaintiffs' suit presents a nonjusticiable political question; (3) adjudication is barred by the recently resuscitated doctrine of foreign-affairs preemption; and (4) resolving plaintiffs' claims would contravene the act-of-state doctrine. All of these interrelated arguments are variations on a common theme—that permitting plaintiffs to proceed with a lawsuit that could expose the fledgling Iraqi government to millions of dollars in liability runs counter to the foreign-policy interests of the United States and may place the Court in the uncomfortable position of resolving claims that the Executive Branch does not want resolved in this forum.

As the following discussion reveals, however, the Court's position is awkward not because adjudication of plaintiffs' relatively narrow claims portends grave international repercussions, but rather because Iraq seeks the same result—dismissal without reaching the merits—that the Court would be obliged to order had the D.C. Circuit adopted the position advanced by the United States, and accepted by then-Circuit Judge Roberts, in *Acree*. The *Acree* decision, as all sides acknowledged at the motions hearing, casts a long shadow over this case. It is therefore with that decision that the Court begins its analysis.

1. Restoration of Iraq's Sovereign Immunity

Iraq and the United States lead with an argument that both know is unavailing: that Presidential Determination 2003-23, which implemented the authority conferred by § 1503 of the EWSAA, restored in part Iraq's sovereign immunity by suspending the application of § 1605(a)(7) to Iraq. *See* Def.'s Opp'n and Reply at 10; Third Statement of Interest of the United States at 2. Both Iraq and the United States concede, as they must, that the D.C. Circuit in *Acree* rejected this very argument. 370 F.3d at 51; *id.* at 60-64 (Roberts, J., concurring in part and concurring in the judgment). The *Acree* majority acknowledged just how close the question was, but ultimately concluded that § 1503 of the EWSAA was only "aimed at legal provisions that present obstacles to assistance and funding for the new Iraqi Government and was not intended to alter the jurisdiction of the federal courts under the FSIA." *Id.* at 51. Judge Roberts, on the other hand, argued persuasively in his separate concurrence that the phrase "'[a]ny other provision' should be read to mean 'any other provision,' not, as the majority would have it, 'provisions that present obstacles to assistance and funding for the new Iraqi government.'" *Id.* at 60 (Roberts, J., concurring in part and concurring in the judgment). Under his interpretation of § 1503, the plain language of that statute authorized the President to make § 1605(a)(7) inapplicable to Iraq, and the Presidential Determination invoking that authority had "ousted the federal courts of jurisdiction" over suits brought under that exception. *Id.*

This Court believes that there is considerable force in the *Acree* concurring opinion, and would be

inclined to adopt that position if free to do so. Nonetheless, this Court remains bound by the *Acree* majority's interpretation of the EWSAA. Iraq recognizes as much and asks only that the Court "render a ruling on this jurisdictional issue . . . so that defendant may, if necessary, seek further review of it before the *en banc* D.C. Circuit or the Supreme Court." Def.'s Opp'n and Reply at 10. The Court will do just that, reiterating here that *Acree* forecloses the argument that the President has made 28 U.S.C. § 1605(a)(7) inapplicable to Iraq and thus partially restored Iraq's sovereign immunity.

2. Political-Question Doctrine

The political-question doctrine, which is "'primarily a function of the separation of powers,'" *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005) (quoting *Baker v. Carr*, 369 U.S. 186, 210 (1962)), "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986). The touchstone for determining whether a case presents a nonjusticiable political question remains the nonexhaustive list of factors set forth by the Supreme Court in *Baker v. Carr*. *See Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006). "Prominent on the surface of any case held to involve a political question," the Court explained,

> is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the

> impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. A court may dismiss a case as nonjusticiable if it finds any one of those six factors. *See Schneider*, 412 F.3d at 194. At the same time, courts may not shirk their responsibility of deciding live controversies properly before them "[u]nless one of these [six] formulations is inextricable from the case," a conclusion that should be reached only after a "discriminating inquiry into the precise facts and posture of the particular case." *See Baker*, 369 U.S. at 217; *Bancoult*, 445 F.3d at 432-33.

Cases implicating national-security concerns and foreign relations are among those most likely to present political questions. As the D.C. Circuit recently put it, these two topics "serve as the quintessential sources of political questions." *Bancoult*, 445 F.3d at 433. It is not surprising, therefore, that Iraq places a heavy emphasis on developments since the United States-led invasion of that country in 2003, including actions taken by the political branches. Armed with snippets from the Statements of Interest that the United States has filed in this matter, the text of an Executive Order

designed to protect Iraqi assets, figures as to the cost of reconstruction efforts, estimates placing Iraq's potential liability in U.S. courts in the hundreds of millions of dollars, and an obligatory citation to the number of American soldiers fighting there, Iraq insists that adjudication of plaintiffs' claims would unreasonably burden its recently installed government and thereby undermine critical U.S. foreign policy interests. *See* Def.'s Mem. at 20-25 & n.9; Def.'s Opp'n and Reply at 10-15. Such interference with foreign policy goals as articulated by the political branches, Iraq submits, renders this case nonjusticiable under the political-question doctrine.

But despite some broad statements linking the political-question doctrine to any issue that implicates United States foreign policy interests, the Supreme Court has made clear that not "every case or controversy which touches foreign relations lies beyond judicial cognizance." *See Baker*, 369 U.S. at 311; *Japan Whaling Ass'n*, 478 U.S. at 229-230; *see also Bancoult*, 445 F.3d at 435. The *Baker* Court itself listed six areas related to foreign affairs in which courts could resolve legal questions notwithstanding the primacy of the political branches. *See* 369 U.S. at 212-13. And in *Japan Whaling Ass'n*, the Court declined to dismiss on political-question grounds a lawsuit that sought to compel the Secretary of Commerce to declare Japan in violation of an international whaling agreement. 478 U.S. at 230. Decisions of the D.C. Circuit in the foreign-affairs area, of which there are many in recent years, likewise require a case-specific application of the *Baker* factors, with a focus "upon 'the particular question posed, in terms of the history

of its management by the political branches.'" *Hwang Geum Joo v. Japan*, 413 F.3d 45, 49 (D.C. Cir. 2005) (quoting *Baker*, 369 U.S. at 211). In its most recent application of the political-question doctrine, the court of appeals further emphasized that the focus must be on the "specific claims" at issue. *Omar v. Harvey*,—F.3d—, 2007 WL 420137, at *8 (D.C. Cir. Feb. 9, 2007). This focus conforms to the Supreme Court's oft-quoted reminder that the doctrine "is one of 'political questions,' not one of 'political cases.'" *Baker*, 369 U.S. at 217; *see also Omar*,—F.3d—, 2007 WL 420137, at *8 (citing *Baker* for this proposition). Hence, Iraq cannot secure dismissal on political-question grounds simply by invoking the foreign-affairs label; a closer examination of both the "specific claims" brought by plaintiffs and the issues alleged to constitute "political questions" is required.

That examination, conducted through the lens of the six sometimes-overlapping *Baker* factors, *see Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005), reveals that plaintiffs' claims are "fully justiciable." *See Omar*,—F.3d—, 2007 WL 420137 at *9. To begin with, plaintiffs' claims are more narrow than some of Iraq's rhetoric suggests. Their claims do not bring into question the propriety of United States policy toward Iraq either at this moment or at the time plaintiffs' fathers were taken hostage by the former regime. Rather, the Third Amended Complaint seeks monetary damages, pursuant to a well-defined statutory scheme established by Congress and a developing body of case law in this district, for the emotional distress and loss of companionship that plaintiffs allegedly suffered when their fathers were detained and held as hostages over ten years ago. Moreover, the Court's

rulings below further limit the scope of this case to resolution of a single cause of action. On the surface, then, this case is similar to the numerous other suits against state sponsors of terrorism brought under § 1605(a)(7) and uniformly found to be justiciable.

The next task is to identify with precision the ways in which adjudicating plaintiffs' surviving claim might infringe on the constitutional prerogatives of the political branches. At the motions hearing, counsel for Iraq helpfully clarified the two "policy questions" that Iraq believes this case implicates and whose resolution supposedly belongs to the political branches, and to the Executive Branch in particular. First, Iraq insists that "the Constitution commits to the Executive, not the judiciary, the critical foreign policy determinations involved in promoting the reconstruction of Iraq and shielding a now friendly government from potentially crippling liability for acts of a predecessor dictatorship." Def.'s Opp'n and Reply at 11. In other words, it is up to the Executive to decide whether Iraq's new government should face hundreds of millions of dollars in liability for the transgressions of the prior regime. *See* Motions Hearing Prelim. Transcript ("Prelim. Tr.") at 27 (describing "the effect of damages liability" on the new Iraqi government as one of the two policy questions).

The second policy question is one that, although lurking in Iraq's filings, defense counsel articulated with precision for the first time at the motions hearing. Seizing on isolated passages from the United States' First Statement of Interest, and in particular on footnote 9 of that document, Iraq maintains that adjudicating this suit in federal court conflicts with the United States' longstanding foreign

policy of resolving the existing tort claims of its nationals via state-to-state negotiations with a formerly hostile, but now friendly, regime. Prelim. Tr. at 22-23, 27, 30. As for the footnote in question, it was written in the specific context of the potential effect of § 1503 of the EWSAA on pending claims and was appended to a paragraph that emphasized the "indisputable authority" of the political branches "to terminate claims that stand as an obstacle to achieving the Nation's foreign policy goals." First Statement of Interest at 16. The footnote clarifies that the statute and subsequent Presidential Declaration "have not extinguished plaintiffs' claims on the merits," even while insisting that the political branches could "plainly" have done so via a treaty or an Executive Agreement had they so desired. *Id.* at 16 n.9 (arguing that the actions of the political branches had the "effect . . . [of] preserv[ing] plaintiffs' claims . . . pending the establishment of a successor government capable of negotiating the diplomatic or other resolution of claims arising from the misdeeds of its predecessor").

Evaluating plaintiffs' specific claims in light of the two policy questions identified by Iraq, the Court finds "no independent reason why the claims presented . . . raise any warning flags as infringing on the prerogatives of the Executive Branch." *See Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1082 (9th Cir. 2006) (declining to dismiss under the political-question doctrine a suit by residents of Papa New Guinea against an international mining company). The first policy question centers on the possibility that a hefty damages award in this case and others similar to it could saddle the fledgling Iraqi government with an unmanageable debt. Iraq's

argument on this point, however, puts the cart before the horse, focusing on a possible outcome of plaintiffs' suit rather than on the actual process of adjudicating the one claim properly before the Court. Plaintiffs' lawsuit has the potential to implicate United States foreign policy only *if* Iraq is found liable and then only to the extent that monetary damages are assessed against it. In other words, plaintiffs' suit could *indirectly* affect the United States' ongoing efforts to stabilize the new Iraqi government only in so far as it seriously impacts the Iraqi fisc. But the D.C. Circuit has consistently stated—and recently reaffirmed—that "an indirect effect on foreign affairs [does] not automatically render a case nonjusticiable." *Bancoult*, 445 F.3d at 435 (citations omitted). The single claim that this Court would be adjudicating does not on its face present a political question, and can be viewed as implicating foreign affairs in only the "indirect" way that all damages actions under the FSIA do: by creating the potential for a significant judgment against a foreign state.

Adjudication of this suit also has little to do with Iraq's second asserted policy question—the wisdom and/or viability of state-to-state negotiations to resolve existing tort claims. Some three years after the United States filed its First Statement of Interest in this case, there remains no indication whatsoever that the Executive Branch has begun seeking via diplomatic means a remedy for these particular plaintiffs or those similarly situated to them. It is likewise unclear when and if Iraq will develop "a successor government capable of negotiating the diplomatic or other resolution of claims arising" from the Saddam Hussein regime.

See First Statement of Interest at 16 n.9. Events in Iraq change daily, and neither counsel for Iraq nor the United States has provided any assurances that the United States' three-year-old intention to resolve outstanding tort claims diplomatically has advanced beyond just that: an abstract intention. *See Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 380, 390-91 (3d Cir. 2006) (declining to dismiss on political-question grounds in part because there was no evidence "that the United States government is engaged in any form of diplomacy or negotiations" to resolve the issue at the heart of the plaintiffs' claims); *Alperin*, 410 F.3d at 549-50, 558 (emphasizing, in refusing to dismiss on political-question grounds claims against a foreign bank, that the plaintiffs' "lawsuit is the only game in town" and there were "[n]o ongoing government negotiations, agreements, or settlements . . . on the horizon"). Accepting this latest iteration of Iraq's political-question argument, in short, would require nothing less than a judicial act of faith—one that would leave the availability of a remedy for these plaintiffs to the vagaries of Iraq's internal struggles and the mere possibility that the Executive Branch will one day undertake negotiations that it has not initiated during the course of either this litigation or the consolidated cases pending before another member of this court. *See Vine v. Republic of Iraq*, Civ. A. Nos. 01-2674, 03-0691, 03-0888 (HHK). So long as the diplomatic solution hinted at by Iraq and the United States remains more fantasy than reality, there is no direct conflict between American foreign policy and adjudication of the particular claims at issue here. *See Gross*, 456 F.3d at 387 ("The mere existence of the Executive's power to extinguish claims . . . , without an exercise of that power, does not render

those claims nonjusticiable by virtue of being committed to a co-equal branch.").

A recent decision in the ongoing *Vine* litigation provides further support for rejecting Iraq's political-question argument. The plaintiffs in *Vine* are United States citizens who were allegedly detained, barred from leaving the country, and in some cases tortured, during Iraq's invasion of Kuwait in 1990. *See Vine v. Republic of Iraq*, 459 F. Supp. 2d 10, 14-15 (D.D.C. 2006). Iraq argued in *Vine* that "the question of its liability in these [consolidated] cases . . . presents a nonjusticiable political question, primarily because any decision to award plaintiffs compensation would undermine the efforts of the President and Congress to create a stable Iraq." *Id.* at 20 (citation and quotation marks omitted). Judge Kennedy rejected this argument. He first clarified that the plaintiffs' specific claims did "not require an evaluation of any executive or congressional policy decision or value judgment." *Id.* On the contrary, he explained, the cases "involve[d] the liability of a foreign sovereign under a well-defined statutory scheme—a statutory scheme that was enacted by both houses of Congress and signed by the President." *Id.* Finally, Judge Kennedy rejected the contention that the dramatic changes in the United States' policy toward Iraq justified dismissal. The language of § 1605(a)(7), he noted, conferred on the federal courts jurisdiction over claims against foreign states who were designated as sponsors of terrorism "at the time the [terrorist] act occurred," signaling Congress's intent to allow suits "against even those foreign nations whose sponsorship of terrorism ceases." *Id.*; *see also Kilburn v. Republic of Iraq*, 441 F. Supp. 2d 74, 78 (D.D.C. 2006) (concluding that Libya, despite a

Presidential Determination ending its status as a state sponsor of terrorism, was still amenable to suit under § 1605(a)(7)), *sum. aff'd*, 2006 U.S. App. LEXIS 26051 (D.C. Cir. Oct. 19, 2006); *Owens v. Republic of Sudan*, 374 F. Supp. 2d 1, 27 n.27 (D.D.C. 2005) (noting that "Congress has chosen to condition an action under section 1605(a)(7) on whether the foreign state was a designated country at the time of the events at issue (and not at the time of the suit)"). The *Vine* court thus "decline[d] to 'convert what is essentially an ordinary tort suit into a nonjusticiable political question' merely because its claims 'arise in a politically charged context.'" 459 F. Supp. 2d at 20 (quoting *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991)).

Iraq assails the *Vine* decision as resting on the mistaken premise that the FSIA's express statutory grant of jurisdiction necessarily outweighs case-specific foreign-policy concerns that counsel against adjudication. Def.'s Opp'n and Reply at 13-14. It is certainly true, as Iraq contends, that the political-question doctrine applies in suits brought pursuant to the FSIA. *See, e.g., Hwang Geum Joo*, 413 F.3d at 48-49 (dismissing on political-question grounds a suit asserting jurisdiction under the FSIA's commercial-activity exception); *see also Baker*, 369 U.S. at 198 (describing the distinction between lack of subject-matter jurisdiction and nonjusticiability as "significant"). But Judge Kennedy did not rule otherwise in *Vine*. Rather, he reasoned that the indirect relationship between the plaintiffs' suit and United States foreign policy in Iraq could not offset the judgment of the political branches that a foreign nation may be sued in U.S. courts for its terrorist acts even if that nation had stopped sponsoring

terrorism by the time of the suit. *See* 459 F. Supp. 2d at 20. The cases cited by Iraq support its general point that the political-question doctrine applies in cases where jurisdiction lies under the FSIA. *See Whiteman v. Dorotheum GMBH & Co. KG*, 431 F.3d 57, 74 n.18 (2d Cir. 2005) (commercial-activity and expropriation exceptions to FSIA); *767 Third Ave. Assoc. v. Consulate General of Socialist Federal Republic of Yugoslavia*, 218 F.3d 152, 162-63 (2d Cir. 2000) (commercial-activity exception); *Anderman v. Federal Republic of Austria*, 256 F. Supp. 2d 1098, 1111 (C.D. Cal. 2003) (commercial-activity and expropriation exceptions). But those cases, none of which addresses the state-sponsored terrorism exception, in no way undermine the *Vine* court's analysis, which draws from the text and structure of § 1605(a)(7) the reasonable inference that the political branches were both aware that suits would continue after regime changes and intended that such suits be permitted. In sum, the reasoning employed and conclusion reached in *Vine* are sound and apply with equal force here.

This Court's independent application of the six *Baker* factors leads it to the same conclusion that Judge Kennedy reached in *Vine*. The first *Baker* factor—whether there has been a "textually demonstrable constitutional commitment of the issue[s in the case] to a coordinate political department," 369 U.S. at 217—has been read as perhaps the most important of the six. *See Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion) (opining that the six factors "are probably listed in descending order of both importance and certainty"). Resolution of the narrow issues before the Court here has not been "constitutional[ly]

commit[ted]" to either of the other branches of government. As Judge Kennedy properly recognized in *Vine*, this Court need not *evaluate* "any executive or congressional policy decision or value judgment" in order to adjudicate plaintiffs' claims. 459 F. Supp. 2d at 20. What the Court must instead do is *implement* the "policy decision" and "value judgment" that the political branches made when they stripped state sponsors of terrorism of sovereign immunity for conduct that was likewise clearly defined in a statute passed by Congress and signed by President Clinton. *See* 28 U.S.C. § 1605(a)(7); *see also Ungar v. Palestine Liberation Org*, 402 F.3d 274, 280 & n.4 (1st Cir. 2005) (explaining that "[t]he very purpose" of both the FSIA and the Anti-Terrorism Act of 1991 was "to allow *the courts* to determine questions of sovereign immunity under a legal, as opposed to a political, regime") (emphasis added). Applying standards set forth in a duly enacted statute that represents the considered judgment of the political branches is a quintessential task undertaken by the federal courts. As the Second Circuit put it in another "politically charged" case that was at bottom "an ordinary tort suit," "[t]he department to whom this issue has been 'constitutionally committed' is none other than our own—the Judiciary." *Klinghoffer*, 937 F.2d at 49.

Iraq's argument to the contrary founders for two reasons: it loses sight of the narrow issues in this suit, and it attempts an end-run around the D.C. Circuit's decision in *Acree*. Iraq places heavy emphasis on the contention that the Constitution places decisions concerning the liability of a now-friendly regime for the acts of its predecessor in the hands of the Executive Branch and removes these

decisions from judicial cognizance. *See* Def.'s Opp'n and Reply at 11. While it is certainly true as a general matter that the Executive Branch is the first mover in the international arena, Iraq fails to explain how this Court would be making any critical foreign policy determinations simply by reaching the merits of plaintiffs' tort claims. Iraq's position once again confuses the United States' *general* interest in ensuring the new Iraqi government's financial stability with the nature of this Court's task in adjudicating the *specific* claims presented in this case. Put differently, Iraq focuses not on "political questions" that would have to be addressed in resolving plaintiffs' specific claims, but instead on the possibility that an eventual monetary judgment against it could undermine United States foreign policy. If what converts an otherwise justiciable suit into a nonjusticiable political question, however, is the mere possibility of a "crippling" monetary judgment against Iraq, then *all* suits against Iraq, including those under the FSIA's commercial-activity exception, would likewise have to be dismissed as presenting nonjusticiable political questions.

Counsel for Iraq argued otherwise at the motions hearing, insisting that a suit alleging tortious misdeeds brought pursuant to § 1605(a)(7) is different from a dispute of a commercial nature. If this were a contract case, counsel contended, the foreign-policy concerns would not be the same because the policy of the United States "has been not to negotiate contract claims on a state-to-state basis." Prelim. Tr. at 24. "But with regard to claims of tortious misconduct committed against its citizens during an era of hostilities," counsel added, "it has been the uniform policy [of the United States] to

negotiate those claims on a state-to-state basis." *Id.* This argument misses the mark for many of the reasons already articulated. First, there is no indication that the United States has ever acted on a policy of negotiating with the new Iraqi government tort claims arising from mistreatment of U.S. citizens by Saddam Hussein's regime. Second, Iraq overlooks the enactment of § 1605(a)(7), a federal statute that provides a judicial forum in which plaintiffs can assert claims arising from "tortious misconduct committed . . . during an era of hostilities." *See id.* The Court can therefore say, much as the First Circuit recently did in refusing to invoke the political-question doctrine, that this case "is a tort suit brought under a legislative scheme that Congress enacted for the express purpose of providing a [judicial forum] for injuries or death occasioned by acts of international terrorism" perpetrated by foreign states. *See Ungar*, 402 F.3d at 280; *see also Price*, 294 F.3d at 88-89 (explaining that Congress via § 1605(a)(7) "sought to create a judicial forum for compensating the victims of terrorism, and in so doing to punish foreign states who have committed or sponsored such acts and deter them from doing so in the future"). Iraq does not account for the distinct possibility that § 1605(a)(7) represents not just a barren jurisdictional provision, but also a conscious break from both traditional theories of foreign sovereign immunity and the "uniform policy" of state-to-state negotiations with now friendly regimes that Iraq believes the United States has long maintained. The Court declines to allow the aspiration that state-to-state negotiations will someday be possible to trump the clear expression of political will embodied in § 1605(a)(7).

Iraq also fails to account fully for the D.C. Circuit's ruling in *Acree*. Were this Court to dismiss plaintiffs' claims as nonjusticiable—ostensibly on the theory that the Executive has expressed the intent to terminate Iraq's exposure under § 1605(a)(7) and shield Iraqi assets from seizure—it would effectively be conferring on the Presidential Determination the precise legal effect that the D.C. Circuit has held it does not have. Counsel for Iraq acknowledged as much at the motions hearing. *See* Prelim. Tr. at 8-9 ("So the result that we are seeking is exactly the same result that a) counsel for the United States is urging and will urge in the future, and b) that the President took action to do."); *id.* at 9 (stating that Iraq's foreign-affairs arguments "are different means of reaching that result"). To be sure, the Court would not be expressly ruling that the Presidential Determination, in combination with the EWSAA, divests it of subject-matter jurisdiction. But the result, and to some extent the rationale, would be virtually indistinguishable: that the Executive's view on the wisdom of shielding Iraq from liability under the state-sponsored terrorism exception requires dismissal of plaintiffs' claims before reaching the merits. *Cf. Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. __, Slip. Op. at 7 (2007) ("Dismissal short of reaching the merits means that the court will not 'proceed at all' to an adjudication of the cause."). Accepting Iraq's argument on this point, then, would grant Iraq the very relief that it was denied in *Acree*. And that would likely be true in this case as well as all others brought against Iraq under § 1605(a)(7), since all such cases implicate the same two foreign-policy concerns—the potential for "crippling" monetary judgments and interference with state-to-state negotiations. The Court is

reluctant to dismiss plaintiffs' suit on the basis of an argument that smacks of an attempt to end-run *Acree* and that would render the court of appeals' decision in that case effectively a nullity.

Having concluded that the first and most important *Baker* factor does not support dismissal, the Court will now address the remaining factors more rapidly. The second factor—the absence of "judicially discoverable and manageable standards," *see* 369 U.S. at 217—is no hurdle to adjudication of plaintiffs' suit. Plaintiffs' surviving claim will be resolved by applying the firmly established requirements of a federal statute (the FSIA) and the principles that courts in this district have developed for resolving claims under the FSIA's state-sponsored terrorism exception. To the extent that plaintiffs' surviving claim sounds in state tort law, the Court will apply eminently "manageable standards" in the form of state common law, which "provides clear and well-settled rules on which [the Court] can easily rely." *Klinghoffer*, 937 F.2d at 49.

The third and fifth *Baker* factors are likewise inapposite. "Adjudicating [the] discrete issues" raised by plaintiffs' suit "will not require the [C]ourt to make pronouncements on foreign policy," *Alperin*, 410 F.3d at 555, which the Court recognizes is something best left to the political branches. Plaintiffs' suit can be resolved without this Court making "an initial policy determination of a kind clearly for nonjudicial discretion," *Baker*, 369 U.S. at 217, because in adjudicating this suit, the Court will be honoring precisely the "policy determination" that "nonjudicial" (i.e., political) officials made when they enacted 28 U.S.C. § 1605(a)(7). Indeed, the enactment of § 1605(a)(7), no less that the

Presidential Determination on which Iraq places so much weight, is a "political decision already made" to which the Court must "adhere" in this case. *See Baker*, 369 U.S. at 217; *see also Owens*, 374 F. Supp. 2d at 28 (acknowledging that the issue of "whether suit should be allowed against [a foreign state] is certainly one that touches on the relationship between the United States and other nations, a concern that is primarily committed to the discretion of Congress and the President," but declining to apply the political-question doctrine because the political branches had spoken through § 1605(a)(7) and by designating the defendant nation a state sponsor of terrorism). The President's actions with respect to Iraq, and in particular Determination 2003-23, are of course other "political decisions" implicated by this and all other lawsuits against Iraq under § 1605(a)(7). But the Court simply cannot accord the same weight to an Executive action that the D.C. Circuit has declared without legal effect as it gives to an unambiguous statute reflecting the political branches' intent that lawsuits of this ilk be resolved in the federal courts. Hence, the third and fifth *Baker* factors both militate in favor of adjudicating plaintiffs' suit.

Analysis of the fourth *Baker* factor—"the impossibility of a court's undertaking independent resolution without expressing lack of the respect due the coordinate branches," *see* 369 U.S. at 217—requires a more extended discussion. Central to this analysis are the two substantive Statements of Interest that the United States has filed in this case. *See Whiteman*, 431 F.3d at 72 n.17 ("In applying th[e] fourth *Baker* test, courts have been particularly attentive to the views of the United States

Government about the consequences of proceeding with litigation."); *Alperin*, 410 F.3d at 556 (noting that the views of the State Department, had it "expressed a view, . . . would certainly weigh in evaluating th[e] fourth *Baker* formulation"). Pointing to recent cases in which the Supreme Court and the courts of appeals have adopted a policy of case-specific deference to the views of the Executive Branch, Iraq maintains that such deference is warranted here and that the Court should honor the United States' view that dismissal of plaintiffs' suit is appropriate. *See* Def.'s Opp'n and Reply at 6-9 n.5, 12 (citing, among others, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004), and *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004)). The Supreme Court in *Altmann*, a FSIA case, acknowledged that the State Department could "fil[e] statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity," and hinted that such statements "might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." 541 U.S. at 701-702. In *Sosa*, the Court cited *Altmann* with approval in suggesting that courts employ "a policy of case-specific deference to the political branches" where adjudication in United States courts threatens to undermine American foreign policy. 542 U.S. at 733 n.21. But because such "case-specific deference" was unnecessary to resolve the issues in both *Altmann* and *Sosa*, the Supreme Court did not flesh out the level of deference owed or indicate just what submissions of the Executive Branch were entitled to heightened deference.

This Court does not have such a luxury in the present case, and will have to decide whether the Statements of Interest filed by the Department of Justice are entitled to the substantial weight that Iraq places on them. Having carefully reviewed both Statements and the relevant post-*Altmann/Sosa* precedents, the Court concludes that the Statements cannot be read to support a finding of nonjusticiability. Two primary considerations inform the Court's conclusion: (1) the precise content of the Statements of Interest, including the purpose for which and context in which they were filed; and (2) the Department of Justice's declination, despite the opportunity to do so, to take a position on the questions of justiciability that Iraq has raised in seeking dismissal. The United States' Statements of Interests cover a limited subject matter and were filed for a limited purpose. Furthermore, the deference due a statement filed by the Executive Branch *does* hinge in large part on the thoroughness of the statement and of the representations made therein, including whether the Executive supports dismissal of the suit and on what grounds. *See, e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc.*, Civ. A. No. 01-9882, 2005 WL 2082846, at *3 (S.D.N.Y. Aug. 30, 2005) ("Courts have assigned varying weight to statements of interest by the United States Government according to the circumstances."). The Court is thus entitled to—and will—place significant weight on the Executive Branch's refusal to support dismissal of this suit specifically on political-question grounds.

Turning first to the content and purpose of the Statements of Interest, counsel for the United States reiterated at the motions hearing what was already

clear from the government's filings: that the United States entered this case primarily "to defend [a] specific act of the President" and "to bring [a] threshold jurisdictional issue to the Court's attention" at a time when Iraq had not yet appeared in the case. Prelim. Tr. at 59-60; *see* Third Statement of Interest at 1 (explaining that the United States filed a statement pursuant to 28 U.S.C. § 517 because of its interests in restoring Iraq's sovereign immunity and in enforcing federal laws). It is not surprising, then, that its Statements of Interest advocate dismissal *exclusively* on the theory rejected by the D.C. Circuit in *Acree*: that Presidential Determination 2003-23 and the EWSAA divested this Court of subject-matter jurisdiction. The United States' first Statement of Interest, filed on March 15, 2004, elaborated on essentially three points: (1) that the Presidential Determination, made pursuant to section 1503 of the EWSAA, had rendered the state-sponsored terrorism exception inapplicable to Iraq effective immediately; (2) that the district court's assertion of jurisdiction in *Acree v. Republic of Iraq*, 276 F. Supp. 2d 95 (D.D.C. 2003), had been in error; and (3) that, even if the Court rejected the United States' jurisdictional argument, plaintiffs had failed to state a claim under *Ciccipio-Puleo*. Nowhere in its Statement did the United States contend that plaintiffs' claims were nonjusticiable or that their suit would have presented an irreconcilable conflict with American foreign policy even in the absence of the Presidential Determination and the EWSAA. In short, the United States' Statement of Interest did not say, "here are the foreign policy reasons why the Executive Branch is worried about continued adjudication of this specific case"; it said something closer to, "here are the foreign-policy reasons why

the President and Congress took a series of actions in 2003."

Recognizing as much, Iraq plucks various sentences out of context in an effort to emphasize the extent to which lawsuits against it could, as a general matter, "significantly interfere with the establishment of a new, peaceful government." Def.'s Opp'n and Reply at 7 (quoting First Statement of Interest at 13). But these and other statements cited by Iraq cannot be unmoored from that specific context, one in which the United States was simply attempting to explain why giving "immediate effect [to] Section 1503 and the Presidential Determination is entirely consistent with the[] underlying foreign policy objectives" of the political branches. First Statement of Interest at 10. The United States' description of those "foreign policy objectives" cannot be read as an *implicit* request by either the Executive Branch generally or the State Department specifically that the Court decline to exercise jurisdiction *in this case*. But without precisely such an indication of how this particular case—as opposed to a class of suits—could substantially interfere with the United States' foreign-policy interests, the Court cannot invoke the "case-specific" deference suggested by *Sosa* and *Altmann*. *See Altmann*, 541 U.S. at 702 ("[S]hould the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.") (emphasis in original); *see also Presbyterian Church of Sudan*, 2005 WL 2082846, at *6 (reading *Altmann* and *Sosa* as establishing that "deference is

appropriate to the extent that a sovereign's opinion has been stated with particularity").

If there were any doubt about the contours of the Executive Branch's position, that doubt would be dispelled by the United States' Third Statement of Interest, in which it *explicitly* declined to take a position on the political-question, foreign-affairs-preemption, and act-of-state arguments that Iraq has raised in its most recent filings. This recent Statement of Interest, weighing in at less than three pages, reasserts the government's position that, notwithstanding the D.C. Circuit's decision in *Acree*, "the combined legislative and executive action that rendered Section 1605(a)(7) of the FSIA inapplicable to Iraq" divests this Court of jurisdiction. Third Statement of Interest at 2. In the remaining sentences, the United States "also reiterates the crucial foreign policy interests underlying those political actions," identifying "the promotion of a peaceful, stable, and democratic Iraq [as] a fundamental goal of U.S. foreign policy," and pointing to the President's view that judicial process against Iraq threatens that policy. *Id.* at 3. As Iraq itself recognizes, however, the United States expressly declined to take a position on "any other issues raised by the parties," *id.*—a category that includes Iraq's arguments that this suit should be dismissed as nonjusticiable, preempted, or barred by the act-of-state doctrine. That silence, particularly in light of foreign-policy interests that are supposedly "crucial," is significant.

Counsel for Iraq has gamely attempted to downplay the significance of the United States' refusal to advocate dismissal on foreign-policy grounds. *See* Prelim. Tr. at 31, 64-65. Iraq is

certainly correct that courts normally defer to the Executive Branch's exposition of its foreign-policy interests, not to its legal conclusions. *See, e.g., Altmann*, 541 U.S. at 701-02; *Sarei*, 456 F.3d at 1080 n.8. On the other hand, Iraq misconceives the distinction drawn in *Altmann* and other cases between the foreign-policy views of the Executive Branch and the Executive's "legal conclusions." *Altmann* itself is instructive in this regard. There, the Supreme Court rejected the "recommendation" of the Executive Branch that the FSIA not be applied to conduct that pre-dated the statute's enactment. 541 U.S. at 701. In so ruling, the Court explained that the view of the United States on "a pure question of statutory interpretation" was "of considerable interest," but did not deserve the same kind of "special deference" to which the view of the State Department "on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct" might be entitled. *Id.* at 701-02 (citing *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446, 448 (1987)). The *Altmann* Court thus reaffirmed that no "special deference" is owed the Executive's views on a pure question of law, but neither said nor hinted that it is improper for courts to focus on whether the foreign-policy concerns that prompt the Executive Branch to express its views are strong enough to lead the Executive also to seek dismissal of the suit.

Various pre- and post-*Altmann* decisions confirm that courts are much more likely to dismiss a case based on the Executive Branch's assertion of important foreign-policy interests when the Executive actually advocates for dismissal on that basis. Recent decisions by the Third and Ninth

Circuits have found the refusal of the Executive Branch to seek dismissal, when it had the opportunity to do so, significant if not dispositive. *See Sarei*, 456 F.3d at 1080-82; *Gross*, 456 F.3d at 385. *Gross* was one in a line of cases in which victims (or heirs of victims) of atrocities during the Nazi era sued German companies for labor abuses, appropriation of private property, and refusal to pay insurance policies. *Id.* at 366. The specific issue before the Third Circuit was whether the district court had erred in dismissing as nonjusticiable a suit seeking interest payments on money paid by German companies to a foundation that had been established to compensate the victims. In dismissing the suit, the district court relied on two letters from the Executive Branch: an undated letter from Deputy Secretary of State Richard Armitage to a German official on the foundation's board of trustees, and a letter submitted to the court by a Department of Justice trial attorney. *Id.* at 372-74. While the Armitage letter expressed the view that the dispute was better resolved diplomatically than judicially, it did not take a position on the merits of the dispute. *Id.* at 373. The Justice Department's letter, the only one filed with the federal courts, was even more barebones, remaining silent on the issue of justiciability and expressly disclaiming a position on the merits. *Id.* at 374.

The Third Circuit concluded that the suit did not present a nonjusticiable political question. Central to that conclusion was the court's ruling that neither letter was entitled to case specific deference. 456 F.3d at 384. The court of appeals emphasized that the Armitage letter had not been directed to a United States court, that it made "no promises to seek

dismissal or that the United States Executive would intervene," and that it took no position on the merits of the plaintiffs' lawsuit. *Id.* The second letter fared no better. It was, the court noted, "from a Department of Justice trial attorney and not from a State Department official." *Id.* Furthermore, that attorney "was silent on the position of the United States as to justiciability and the proper forum in which to resolve the dispute." *Id.* The two letters revealed only that "the United States ha[d] declined to express to the District Court or [the court of appeals] a position on the justiciability or merits of the 'interest' dispute, except its lack of a position." *Id.* at 385. And because the United States had failed to do so, the court concluded that the "Executive [Branch] has not, through an expression of its interest in the case, committed the 'interest' dispute to a political branch." *Id.*

The Ninth Circuit's decision in *Sarei*, issued just days after *Gross* and later cited with approval by the D.C. Circuit, *see Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 354-55 (D.C. Cir. 2007), is to the same effect. In *Sarei*, the court of appeals reversed a district court decision that had dismissed on political-question grounds a suit filed by former residents of Papa New Guinea under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. The State Department had filed a Statement of Interest that, while declining to take positions on the political-question and act-of-state issues raised by the defendant, expressed the United States' view that adjudication threatened "very grave" consequences for American foreign policy. 456 F.3d at 1075-76. Although according "serious weight" to the Statement of Interest," the Ninth Circuit held that the filing did not establish any of the final three

Baker factors. *Id.* at 1082. Of particular significance to the court was the fact that "[t]he State Department explicitly did *not* request that [it] dismiss this suit on political question grounds." *Id.*; *cf. Presbyterian Church of Sudan*, 2005 WL 2082846, at *6 (refusing to dismiss an ATS suit under the political-question doctrine, and finding significant the brevity of the Executive Branch's filing because the State Department "has not hesitated to warn courts where it believes continuation of a lawsuit will affect a foreign government's policy to the extent that it would disturb U.S. relations with that foreign government"). "[W]e are confident," the *Sarei* court explained, "that proceeding does not express any disrespect for the executive, even if it would prefer that the suit disappear." 456 F.3d at 1082.

Although it has not definitively decided the issue, the D.C. Circuit has also recently indicated that it too believes that the level of deference due a Statement of Interest turns on whether the Executive Branch merely voices foreign-policy concerns or instead directly requests that a suit be dismissed as nonjusticiable. *See Doe*, 473 F.3d at 354. One of the questions in *Doe* was whether Exxon Mobil could obtain mandamus relief on the ground that the district court had "clearly and indisputably exceeded its jurisdiction by refusing to dismiss th[e] case under the political question doctrine." *Id.* at 349, 353 (citations, quotation marks, and alterations omitted). Exxon argued that the district court had erred by declining to defer to a letter in which the State Department's Legal Advisor expressed concerns about the suit's impact on relations between the United States and Indonesia. The D.C. Circuit rejected "Exxon's contention that there is a

conflict between the views of the State Department and those of the district court." *Id.* at 354. Pointing to language in the letter that revealed the tentative nature of the State Department's views, the court read the letter "not as an unqualified opinion that this suit must be dismissed, but rather as a word of caution to the district court alerting it to the State Department's concerns." *Id.* Because "the State Department did not necessarily expect the district court to immediately dismiss the case in its entirety," the court reasoned, there was no need to "decide what level of deference would be owed to a letter from the State Department that *unambiguously* requests that the district court dismiss a case as a non-justiciable political question." *Id.* The D.C. Circuit thus signaled its view that there is in fact a difference between the "level of deference" owed an Executive Branch filing "that *unambiguously* requests" dismissal under the political-question doctrine and a filing that merely alerts a court to the possibility that a pending suit, depending on its scope and outcome, could affect American foreign-policy interests somewhere down the road.

This reading of *Doe*, *Gross*, and *Sarei* is consistent with the reasoning of and results in the cases cited by Iraq. Indeed, the cases cited by Iraq illustrate the corollary to the principle explained in the preceding paragraphs--namely, that courts are especially likely to defer to an Executive Branch explanation of foreign-policy interests when that explanation comes in the form of a filing seeking dismissal on foreign-policy grounds. Thus, the Second Circuit in *Whiteman v. Dorotheum GMBH & Co. KG*, 431 F.3d 57, 63 (2d Cir. 2005), dismissed under the political question doctrine a suit that the United States

described as the final case preventing an Executive Agreement with Austria from taking effect. There, however, the supplemental Statement of Interest jointly filed by the Departments of State and Justice explicitly averred that it was "in the foreign policy interests of the United States for this action to be dismissed on *any valid legal ground*." *Id.* (quoting U.S. Supplemental Letter at 6) (emphasis added). The letter went on to note a recent decision in which the Eleventh Circuit had dismissed a similar suit under the doctrine of international comity, and implored the Second Circuit to give deference to the articulated foreign-policy interests in considering dismissal under any of "several abstention doctrines" or any other "legal arguments advanced by the defendants in seeking dismissal." U.S. Supplemental Letter at 6, 8. Another Second Circuit decision cited by Iraq, *767 Third Ave. Assoc. v. Consulate General of Socialist Federal Republic of Yugoslavia*, 218 F.3d 152, 160 (2d Cir. 2000), fits the same pattern. In affirming the district court's dismissal of a suit involving the by-then-dissolved Republic of Yugoslavia, the Second Circuit relied in part on an amicus brief in which the United States had specifically invoked the political-question doctrine in seeking outright dismissal of the case. *See id.*; *see also* Brief for Amicus Curiae United States of America Supporting Appellees, *767 Third Ave. Assoc. v. Consulate General of Socialist Federal Republic of Yugoslavia*, 218 F.3d 152 (2d Cir. 2000) (99-9011).

The most relevant example of this trend is the primary D.C. Circuit authority upon which Iraq relies—the decision in *Hwang Geum Joo*, 413 F.3d at 48-52. There, the court of appeals dismissed on political-question grounds a suit by women who

claimed that they had been raped and tortured by Japanese soldiers during World War II. A central issue was whether treaties that Japan had signed with the women's countries of origin had preserved or extinguished the claims of those countries' citizens against Japan. *Id.* at 48. Relying on "a thorough and persuasive Statement of Interest" submitted by the United States, *id.*, the court held that resolution of this issue was a political question because "adjudication by a domestic court not only 'would undo' a settled foreign policy of state-to-state negotiation with Japan, but could also disrupt Japan's 'delicate' relations with China and Korea." *Id.* at 52 (quoting United States' Statement of Interest at 34-35).

Because the case was remanded by the Supreme Court for further consideration in light of *Altmann*, the United States actually submitted two amicus briefs during the course of the *Hwang Geum Joo* appeal. Both briefs argued that the plaintiffs' claims were nonjusticiable, the earlier one doing so as an alternative argument and the latter advancing that argument expressly and from the outset. *See* Brief for Amicus Curiae the United States of America at 28-29, *Hwang Geum Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003) (No. 01-7169); Supplemental Brief on Remand for Amicus Curiae the United States of America at 9, 11-12, *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005) (No. 01-7169). The Supplemental Brief emphasized what the United States believed to be "the broader question before the [D.C. Circuit]: whether a foreign policy determination that wartime claims against Japan should not be entertained in U.S. courts renders such claims nonjusticiable." *Id.* at 11. Under "similar

circumstances," the United States argued successfully, "courts have consistently held that dismissal is appropriate on political question, international comity, or other doctrinal grounds." *Id.* at 12; *see also id.* at 9 (citing the Supreme Court's decision in *Baker v. Carr* for the proposition that "courts should not second-guess" the Executive's foreign-policy determinations). In *Hwang Geum Joo*, as in the other key cases cited by Iraq, the court deferred to the foreign-policy judgment of the Executive Branch in a setting where the Executive had explicitly sought dismissal on justiciability grounds.

A rather simple proposition emerges from this lengthy background: under the fourth *Baker* factor, the level of deference owed a statement of interest filed by the Executive Branch depends on, among other factors, what the statement actually says; who (i.e., which Executive agency) submitted it; and, perhaps most critically, whether the United States supports dismissal on the basis of the political-question doctrine or other related grounds. As applied here, these criteria lead inexorably to the conclusion that this case is justiciable. With respect to content and context, the Statements of Interest never stray from the Justice Department's limited purposes of defending an action by the President and alerting the Court to what was at that time an open and potentially dispositive jurisdictional question. The passages on which Iraq seizes explain the foreign-policy motives of the political branches—especially the President—but do not purport to set forth the views of the State Department as to whether and why adjudicating this *particular* case would threaten U.S. foreign policy. *See Altmann*, 541

U.S. at 702. Indeed, the fact that the Statements of Interest were filed by the Justice Department, rather than the State Department, serves both to reinforce the limited purposes for which they were submitted and to rebut Iraq's efforts to convert isolated sentences into authoritative declarations of the Executive's views on the foreign-affairs implications of this case. *See Gross*, 456 F.3d at 384.

Finally, as Iraq concedes, the Statements of Interest expressly decline to take a position on whether this suit presents a nonjusticiable political question. The United States has taken a position on only one of the arguments advanced by Iraq, but has declined, despite the Court's invitation, to endorse the view that plaintiffs' suit is nonjusticiable. Neither the United States' refusal to take a position nor its comments in explaining a no longer viable theory of dismissal mandate the heightened "case-specific" deference that the D.C. Circuit in *Hwang Geum Joo* accorded the Executive Branch's unequivocal and detailed request that the case be deemed nonjusticiable, 413 F.3d at 48, or that the Second Circuit in *Whiteman* accorded the Executive's view that the last remaining obstacle to enforcement of an Executive Agreement should be dismissed "on any valid legal ground," 431 F.3d at 63. This case is instead analogous in all material ways to *Gross* and *Sarei*, where the Third and Ninth Circuits declined to dismiss the respective suits on political-question grounds despite treating the United States' expressions of interest with respect. The same conclusion follows here, where this Court has likewise carefully reviewed and extensively considered the views set forth by the United States in both Statements of Interest and at the motions

hearing. But because the United States has not indicated—and the Court finds no independent reason to conclude—that adjudicating plaintiffs' claims would "express[] lack of the respect due the coordinate branches," dismissal under the political-question doctrine on the basis of the fourth *Baker* factor is inappropriate. *See* 369 U.S. at 217.

This leaves the sixth *Baker* factor and brings the Court back to where this analysis began: the D.C. Circuit's decision in *Acree*. The sixth *Baker* factor gauges the potential for "embarrassment from multifarious pronouncements by various departments on one question." *See* 369 U.S. at 217. There is little doubt that this case implicates that factor. Congress and the President spoke with one voice in 1996 when they stripped state sponsors of terrorism of immunity for certain terrorist acts. A strong argument has been made—both by the United States and by then-Circuit Judge Roberts in *Acree*—that the political branches once again spoke with one voice in seeking to remove Iraq from that disreputable list in 2003. But the D.C. Circuit has held otherwise, and absent en banc or Supreme Court consideration, or a Congressional response to *Acree*, *every* case brought against Iraq under § 1605(a)(7) will present the same cacophony of actions and arguments: an unambiguous statute that provides a judicial forum for victims of terrorism to seek redress for the wrongs they suffered, the President's attempt to restore Iraq's sovereign immunity pursuant to a statute that he believed equally clear, and the court of appeals' ruling that Congress did not give the President the power to throw this suit and similar ones out of the judicial forum that had been created in 1996. In other words,

to the extent that there exists a potential for "embarrassment," that potential stems from the D.C. Circuit's holding that the EWSAA did not give the President the authority that he thinks Congress gave him, *not* from this Court's adjudication, almost three years after *Acree* was decided, of the narrow claims advanced by plaintiffs here. Accordingly, the final *Baker* factor, although surely implicated, does not weigh in favor of dismissing plaintiffs' suit.

3. Foreign-affairs preemption

Iraq next asks the Court to dismiss plaintiffs' claims on the strength of "the doctrine of foreign affairs preemption," which it says "rests on many of the same considerations underlying the political question doctrine." Def.'s Opp'n and Reply at 15. The basis for this argument is the Supreme Court's decision in *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). That case involved California's Holocaust Victim Insurance Relief Act ("HVIRA"), a state law that required insurers doing business in California to disclose information about holocaust-era insurance policies. *Id.* at 409. HVIRA also created a private cause of action and extended the statute of limitations for individuals to assert claims "based on acts perpetrated in the Holocaust." *Id.* The primary question before the Supreme Court was whether the state statute was preempted because it conflicted with the federal government's elaborate efforts in the international arena to resolve disputes over the insurance claims of Holocaust survivors.

Answering that question in the affirmative, the Court relied heavily on its decision in *Zschernig v. Miller*, 389 U.S. 429, 432 (1968), in which an Oregon probate statute prohibiting inheritance by a nonresident alien was invalidated as an "intrusion

by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." The *Garamendi* majority acknowledged that the lead opinion in *Zschernig* could be read as standing for the proposition "that state action with more than an incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict." 539 U.S. at 418. But Justice Harlan's separate opinion in *Zschernig* had declined to go so far, instead endorsing the view that, absent federal action, "the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations." 389 U.S. at 459 (Harlan, J., concurring in the result). The *Garamendi* Court deemed it unnecessary, however, to choose between the broader reading of *Zschernig* and Justice Harlan's more narrow view. 539 U.S. at 419-20 & n.11 (describing the two positions as "complementary," and noting that where states act in their areas of traditional competence, "it might make good sense to require a conflict, of a clarity and substantiality that would vary with the strength or the traditional importance of the state concern asserted"). This was because the state statute was preempted even under Justice Harlan's view, since it generated a "clear conflict" with the Executive Branch's efforts to settle claims in the international arena, and the state's interests "in regulating disclosure of European Holocaust-era insurance policies" were relatively weak. *See id.* at 421-25. The California statute, the Supreme Court explained, used "an iron fist where the President has consistently chosen kid gloves," *id.* at 427, and thus was likely to "produce something more than

incidental effect in conflict with express foreign policy of the National Government," *id.* at 420.

Iraq's reliance on *Garamendi* is flawed for at least two reasons. First and foremost, there is a serious question as to whether *Garamendi*'s "conflict" analysis even applies to a case such as this one, where it is a *federal statute* that establishes the exclusive framework for suing a foreign sovereign and that contemplates that state law will provide the rule of decision. See 28 U.S.C. § 1606 ("[T]he foreign state shall be liable to the same manner and to the same extent as a private individual under like circumstances."); *Bodoff v. Islamic Republic of Iran*, 424 F. Supp. 2d 74, 83 (D.D.C. 2006) (describing § 1606 as "a 'pass-through' to substantive causes of action against private individuals that may exist in federal, state or international law." (citation omitted)). The Supreme Court has recognized in construing the FSIA that the statute permits—and indeed may require—application of state law in suits against foreign sovereigns. *See First Nat. City Bank v. Banco Para el Comercio*, 462 U.S. 611, 622 n.11 (1983) ("[W]here state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances."); *cf. Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983) (holding that the FSIA did not violate Article III of the Constitution "by granting federal courts subject-matter jurisdiction over certain civil actions . . . against foreign sovereigns where the rule of decision may be provided by state law"). Iraq has cited no cases, and the Court is aware of none, in which a federal court has applied the foreign-affairs-preemption doctrine recognized in *Garamendi* and *Zschernig* to a suit

brought pursuant to the FSIA. The sole post-*Garamendi* authority cited by Iraq involved claims against two *American* corporations, such that the FSIA did not apply. *See Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1185-88 (C.D. Cal. 2005) (dismissing under the foreign-affairs-preemption doctrine the plaintiffs' state tort law claims). There is good reason for this absence of on-point authority: it makes little sense to describe a state law as "clearly conflicting" with the federal government's foreign policy when a law enacted by the federal government is what allows plaintiffs to invoke, and instructs federal courts to enforce, state law causes of action.

Second, even assuming that the "conflict" framework applies, there are numerous and critical distinctions between the present case and *Garamendi*. For one thing, at issue in *Garamendi* was the validity of a state legislative enactment specifically intended to reach sensitive foreign-policy matters. Here, conversely, the only state "action" implicated is the Florida and Oklahoma common law of tort; the existence of such court-created common law evinces no effort on the part of either of those state governments to weigh in on knotty issues of international consequence. *Cf. Garamendi*, 539 U.S. at 439 (Ginsburg, J., dissenting) ("The notion of 'dormant foreign affairs preemption' with which *Zschernig* is associated resonates most audibly when a state action reflects a state policy critical of foreign governments and involves sitting in judgment of them." (citation, quotation marks, and alterations omitted)); *Doe v. Exxon Mobil Corp.*, Civ. A. No. 01-1357, 2006 WL 516744, at *3 (D.D.C. March 3, 2006) (finding *Garamendi* "simply not applicable" because

"no state government has passed any statute in conflict with U.S. foreign policy"), *appeal dismissed*, 473 F.3d 345 (D.C. Cir. 2007). Iraq downplays the difference between affirmative state legislative action and the application of state common law, insisting that, "[a]s with other preemption doctrines, the doctrine of foreign affairs preemption applies equally to state statutes and state common law causes of action." Def.'s Opp'n and Reply at 16 n.8. Maybe so. But what this argument overlooks is that the common law of tort is plainly an area of "traditional" state competence. Under *Garamendi*, Iraq must identify a "conflict [] of a clarity or substantiality that [varies] with the strength or the traditional importance of the state concern asserted." 539 U.S. at 419 n.11; *see also id.* at 427 ("The question relevant to preemption in this case is conflict."). And because the concerns underlying the tort of intentional infliction of emotional distress are "legitimate" and "substantial," *see Farmer v. United Brotherhood of Carpenters & Joiners*, 430 U.S. 290, 302-03 (1977), Iraq must demonstrate a similarly "substantial" conflict between the state tort laws and U.S. foreign policy.

This Iraq cannot do. There is simply no appreciable conflict between applying state tort law via § 1606 of the FSIA and American foreign policy as articulated by the federal government. As was explained in the political-question analysis above, allowing plaintiffs' suit to proceed cannot unduly interfere with country-to-country negotiations that are at this point more of an aspiration than a policy. *See Gross*, 456 F.3d at 380, 390-91; *Alperin*, 410 F.3d at 558. Furthermore, even if the application of state law leads to a judgment against Iraq, the only effect that this

particular case will have is on the Iraqi government's finances. And if such an effect is enough to establish a "clear conflict" with American foreign policy, then *all* suits against Iraq under the FSIA in which state law provides the rule of decision—or at a minimum, all suits brought under § 1605(a)(7)—would also be preempted. Nothing in the *Garamendi* majority's narrow opinion indicated an intent to mandate such a strange result or to upset settled principles of law in the FSIA context. *See First Nat. City Bank*, 462 U.S. at 622 n.11 (acknowledging that state law can and at times must provide the rule of decision via §1606 of the FSIA).

Finally, the present case is quite simply miles away from *Garamendi* on the facts. There have not been, as in *Garamendi*, extensive efforts to resolve claims by former hostages in the international arena. *Cf. Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 236-38 (D.C. Cir. 2003) (holding that plaintiffs' FSIA suit was barred by an Executive Agreement that precluded claims by former hostages against Iran); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 16 (D.D.C. 2005) (declining to dismiss a suit on political-question grounds where, "unlike in many other reparations cases entangled with political questions, there is no state-negotiated reparations agreement competing for legitimacy with this court's rulings"). The *possibility* of such extensive efforts at some indeterminate future date is no substitute for the *actual* diplomatic solution toward which the Executive had worked in *Garamendi*.

Moreover, to the extent that the application of state common law could be viewed as conflicting with the United States' general interest in stabilizing Iraq, Florida and Oklahoma's interest in seeing their

generally applicable tort laws applied to protect their residents is substantial enough to offset such a conflict. The Supreme Court has recognized the strength and legitimacy of the state interests involved in holding that a state-law cause of action for intentional infliction of emotional distress was not preempted by the federal labor laws. *See Farmer*, 430 U.S. at 302-03. In so ruling, the Court repeatedly pointed to the state's "legitimate" and "substantial interest" in protecting its citizens "from emotional distress caused by outrageous conduct," an interest tied to the states' more general interest "in protecting the health and well-being of its citizens." *See id.* at 302, 304. The tenuous nature of the conflict (if there even is one), along with the strength of the state interests implicated, distinguishes this case from *Garamendi* and suggests that preemption under the foreign-affairs doctrine is inappropriate.

4. Act-of-state doctrine

Iraq's final foreign-affairs salvo is the act-of-state doctrine. That doctrine bars courts from adjudicating a case "when 'the relief sought or the defense interposed would [require] a court in the United States to declare invalid the official act of a foreign sovereign performed within' its boundaries." *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002) (quoting *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990)). "[M]ost recently described . . . as a consequence of domestic separation of powers, reflecting the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder the conduct of foreign affairs," *id.* at 1165 (citations and quotation marks omitted), the act-of-

state doctrine "provides foreign states with a substantive defense on the merits." *Altmann*, 541 U.S. at 700. "The policies underlying the doctrine include international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations." *World Wide Minerals*, 296 F.3d at 1165 (citations and quotation marks omitted). When the factual predicate for the doctrine's application exists, courts decide whether to invoke it by assessing three factors: (1) the degree of consensus concerning a particular area of international law, (2) the implications of the issue for the United States' foreign relations, and (3) whether the government that perpetrated the act or acts at issue is still in existence. *See Owens v. Republic of Sudan*, 374 F. Supp. 2d 1, 26 (D.D.C. 2005).

There is no question here that "the factual predicate for application of the act of state doctrine" exists, *W.S. Kirkpatrick*, 493 U.S. at 405, since plaintiffs' claims center on the propriety of the Iraqi government's detention and imprisonment of Beaty and Barloon within Iraqi territory. *See Underhill v. Hernandez*, 168 U.S. 250, 254 (1897) (dismissing under the act-of-state doctrine suit in which the plaintiff alleged that he had been unlawfully detained and assaulted by revolutionary forces that the United States later recognized as Venezuela's government). Hence, the principal issue is "whether the purpose of the act of state doctrine would be furthered by its application in this case." *W.S. Kirkpatrick*, 493 U.S. at 405; *see Sarei*, 456 F.3d at 1084. In addressing that issue, Iraq properly recognizes that both this Court in *Owens* and Judge

Friedman in *Daliberti I* expressed great skepticism about applying the act-of-state doctrine to suits brought under the FSIA's state-sponsored terrorism exception. *See Owens*, 374 F. Supp. 2d at 26-27; *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 54-55 (D.D.C. 2000). This hesitance is rooted in the fact that the political branches enacted a statute whose text and structure expressly contemplate holding a foreign state liable for terrorist acts committed years earlier, and that this statute does not come into play unless the Executive Branch had identified a nation as a sponsor of terrorism at the time of the acts at issue. *See Owens*, 374 F. Supp. 2d at 27; *Daliberti I*, 97 F. Supp. 2d at 55. Under such circumstances, it is difficult if not impossible to say that the judiciary would be unduly interfering with the political branches' conduct of foreign policy, which is the principal concern underlying the act-of-state doctrine. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1965); *W.S. Kirkpatrick*, 493 U.S. at 404.

These justifications for refusing to invoke the act-of-state doctrine in *Daliberti I* and *Owens* apply fully here. Indeed, because the actions underlying plaintiffs' claims are the same ones already litigated in *Daliberti I*, Iraq must demonstrate that something is different here. The critical difference, it says, is that the regime that perpetrated the acts underlying plaintiffs' claims is no longer in power, and has been replaced with a new government whose stability and success are a major foreign-policy objective of the United States. *See* Def.'s Opp'n and Reply at 23-24 (quoting *Sabbatino*, 376 U.S. at 428 ("The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of

state is no longer in existence . . . , for the political interest of this country may, as a result, be measurably altered.")); *see also Owens*, 374 F. Supp. 2d at 26 (listing "whether the government that perpetrated the challenged act is still in existence" as one consideration for applying the act-of-state doctrine). Although the existence of a new government is certainly significant, the Court is not convinced that this single distinction either (1) offsets the *Daliberti I* court's reasoning that dismissal "would constitute more of a judicial interference in the announced foreign policy of the political branches of government than to allow the suit to proceed under the explicit authorization of Congress," 97 F. Supp. 2d at 55; or (2) suffices to justify dismissing a lawsuit that was filed *before* the regime change and that is based on the same underlying conduct as was *Daliberti*.

This is especially so given the lack of case-specific action on the part of the very political branches whose "announced foreign policy" the courts attempt to respect. *See id.* The Executive Branch, despite the President's publicly expressed desire to shield Iraq from liability, has declined to raise the act-of-state doctrine in its Statements of Interest and has explicitly declined to support Iraq's invocation of the doctrine. The out-of-context snippets from those Statements reproduced by Iraq hardly constitute the "considered judgment" or "opinion" of the State Department "on the implications of exercising jurisdiction over *particular* [foreign states] in connection with *their* alleged conduct." *See Altmann*, 541 U.S. at 702; *see also id.* at 714 (Breyer, J., concurring) (emphasizing that the United States could file statements of interest that refer "not only

to sovereign immunity, but also to other grounds for dismissal, such as . . . the nonjusticiable nature . . . of the matters at issue") (citations omitted). If the regime change were an event so cataclysmic as to mandate a result here contrary to the one in *Daliberti*, one would expect the Executive Branch, especially when given the chance, to say so explicitly.

To be sure, Iraq is correct that dismissal on act-of-state grounds may be appropriate regardless of the position taken by the Executive Branch. The Supreme Court has so suggested, *see Sabbatino*, 376 U.S. at 436, and other courts have gone so far as to raise the act-of-state doctrine on their own either in a default proceeding or when resolution of a case on the merits might embarrass the United States government. *See Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1992); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1290 (N.D. Cal. 2004). But those situations are easily distinguishable from this case. *Sabbatino* itself is a poor analogue because, by the time the case reached the Supreme Court, the Executive Branch had cleared up the ambiguity in its earlier statements by expressly seeking dismissal on act-of-state grounds. *See* 376 U.S. at 420; Brief for United States as Amicus Curiae, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1963) (No. 16), reprinted in 2 I.L.M. 1009 (1963). Furthermore, as was explained at length above, adjudicating the particular claims in this case is unlikely to cause excessive—if any—embarrassment to the United States government. If such embarrassment were indeed a risk, the Court would certainly have expected the Executive Branch to so indicate when given the chance to do so. Finally, the additional caution that may be called for in a default proceeding is not warranted here, where

Iraq is represented by able counsel. The Court therefore declines, as it did in *Owens*, to dismiss on act-of-state grounds "an action that entails no greater consideration of the acts of a foreign state than any other claim under section 1605(a)(7)." 374 F. Supp. 2d at 28.

B. Failure to State a Claim

Having concluded that plaintiffs' suit need not be dismissed on jurisdictional or prudential grounds, the Court will now take up Iraq's argument that plaintiffs have failed to state a claim upon which relief can be granted. Iraq contends that Counts II and III of plaintiffs' Third Amended Complaint must be dismissed because federal common law does not furnish a cause of action in cases under the state-sponsored terrorism exception, a conclusion that this Court already reached in *Dammarell v. Islamic Republic of Iran*, Civ. A. No. 01-2224, 2005 WL 756090, at *23 (D.D.C. March 29, 2005) ("*Dammarell II*") ("[F]ederal common law should not serve as a rule of decision in the run of section 1605(a)(7) cases."). At the same time, Iraq asks the Court to reconsider its holding in *Dammarell II* that state common law can supply a cause of action in suits brought pursuant to § 1605(a)(7). Because both parties focus on this Court's decision in *Dammarell II*, a brief review of that decision, and the reasoning underlying the Court's conclusions, is warranted.

1. The continuing validity of Dammarell II

This Court in *Dammarell II* endeavored to answer one of the principal questions left open by the D.C. Circuit's decisions in *Ciccipio-Puleo* and *Acree*: what "particular causes of action . . . may be brought against a foreign state in a case proceeding under

section 1605(a)(7)." 2005 WL 756090, at *11. After a thorough "examination of the plain text, the structure, and the legislative history of sections 1605(a)(7) and 1606, and a comparison to the analogous statutory scheme of the [Federal Tort Claims Act]," the Court concluded that "the causes of action that may be brought against the foreign state . . . include any claims that can be brought against a private individual in like circumstances"—to wit, claims arising under "state common and statutory law, federal statutory law, and even the law of a foreign state." *Id.* at *14. Conspicuously absent from the sources of law held to supply cognizable causes of actions was federal common law. The starting point for the Court's conclusion in that regard was the D.C. Circuit's then-recent decision in *Bettis v. Islamic Republic of Iran*, 315 F.3d 325 (D.C. Cir. 2003). The court of appeals in *Bettis*, this Court explained, had "cautioned against the creation of a federal common law remedy" in the context of the state-sponsored terrorism exception. 2005 WL 756090, at *23. Indeed, the *Bettis* court interpreted § 1606 as "in effect instruct[ing] federal judges to find the relevant law, not to make it." 315 F.3d at 333. This Court then reviewed other potential justifications for fashioning federal common law—predictability and uniformity in an area of law, the existence of interests that are uniquely federal in nature, possible conflicts between state law and federal interests, and the Supreme Court's recognition of an extremely narrow class of federal-common-law claims in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)—and determined that none of those justifications overcame the textual and structural mandate of the statute or the general rule against

creating federal common law. *See* 2005 WL 756090, at *28.

As the parties recognize, *Dammarell II* both buoys and undermines critical aspects of their respective positions. Iraq points out that the Court's ruling with respect to federal common law spells trouble for two of the three counts in plaintiffs' complaint. On the other hand, the Court's conclusion that state common law can provide a cause of action in cases brought pursuant to § 1605(a)(7) disposes of a principal ground on which Iraq seeks dismissal of Count I and shifts the focus to whether plaintiffs have stated a valid claim for intentional infliction of emotional distress under Florida and Oklahoma law. Hence, the question is whether either the arguments advanced by Iraq or jurisprudential developments in the last two years call into doubt the soundness of this Court's reasoning and conclusions in *Dammarell II*.

The Court answers that question in the negative. Two primary considerations guide this answer. For one thing, Iraq's arguments substantially mirror ones that the Court has already considered and rejected. In other words, Iraq's plea to reevaluate *Dammarell II* is based not on new information, extant jurisprudence or policy arguments that the Court overlooked, or even intervening case law, but instead on a simple disagreement with the conclusions that this Court reached. Such disagreement, without more, does not support revisiting a well reasoned decision that has been widely followed. Indeed, it is precisely the wide acceptance by other judges in this district that provides a second reason for reaffirming the validity of *Dammarell II*. In a series of cases brought under §

1605(a)(7), other members of this district court have adopted this Court's reasoning, often explicitly, in concluding both that state law can provide a cause of action and that federal common law cannot. *See, e.g., Blais v. Islamic Republic of Iran*, 459 F. Supp. 2d 40, 54 (D.D.C. 2006) (RCL); *Vine v. Republic of Iraq*, 459 F. Supp. 2d 10, 25-26 (D.D.C. 2006) (HHK); *Reed v. Islamic Republic of Iran*, 439 F. Supp. 2d 53, 60 (D.D.C. 2006) (RMU); *Holland v. Islamic Republic of Iran*, Civ. A. No. 01-1924, 2005 U.S. Dist. LEXIS 40254, at *33-*56 (D.D.C. Oct. 31, 2005) (CKK). This Court's decision in *Dammarell II* thus represents the prevailing view of judges in this district on at least two critical questions left unanswered by the D.C. Circuit's opinions in *Ciccipio-Puleo* and *Acree*. Until the D.C. Circuit or the Supreme Court rules otherwise, this Court will adhere to the conclusions reached and the reasoning set forth in *Dammarell II*. Accordingly, Iraq's request to revisit that decision is rejected.

2. Dammarell II requires dismissal of Counts II and III

As was intimated above, Counts II and III of plaintiffs' Third Amended Complaint fail under *Dammarell II*. Count II purports to state a claim for "violations of customary international law incorporated into federal common law," while Count III asserts a federal-common-law claim for loss of solatium. *See* Third Am. Comp. at ¶¶ 32-40. Because federal common law cannot "serve as a rule of decision in . . . section 1605(a)(7) cases," both of these counts fail to state a claim upon which relief can be granted and must therefore be dismissed. *See Dammarell II*, 2005 WL 756090, at *23; *see also Vine*, 459 F. Supp. 2d at 27; *Pugh v. Socialist People's*

Libyan Arab Jamahiriya, Civ. A. No. 02-2026, 2006 WL 2384915, at *12-*14 (D.D.C. May 11, 2006); *Holland*, 2005 U.S. Dist. LEXIS 40254, at *48-*56. Count III also fails to state a claim on the alternative ground that "[s]olatium . . . is not an independent cause of action, but rather is a form of damages." *See Reed*, 439 F. Supp. 2d at 67-68 (citing *Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105, 115 (D.D.C. 2005) (interpreting Illinois law)). As such, "[a] defendant cannot be liable for solatium but can be liable for solatium damages through other causes of action." *Id.* at 68 (citing *Salazar*, 370 F. Supp. 2d at 115).

In the face of these authorities, plaintiffs cling to two other cases from this district: *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 113 (D.D.C. 2000), and *Dodge v. Islamic Republic of Iran*, Civ. A. No. 03-0252, 2004 U.S. Dist. LEXIS 29045, at *11-*14 & n.8 (D.D.C. Aug. 25, 2004). Neither of these decisions suffices to salvage Counts II and III. *Anderson* was decided long before the D.C. Circuit dramatically altered the jurisprudence in this area of the law in *Ciccipio-Puleo* and *Acree*, and consequently includes almost no discussion of the complex issues raised by those cases. To the extent that the *Anderson* court's reliance on federal common law is inconsistent with *Dammarell II*, this Court declines to follow *Anderson*. Furthermore, although it was decided after *Ciccipio-Puleo*, the *Dodge* case merely asserts without explanation that plaintiffs who bring suit under § 1605(a)(7) "may sue [a foreign] state under any cause of action arising from common law, foreign law, or federal statute which might ordinarily give rise only to individual liability." 2004 U.S. Dist. LEXIS 29045, at *12. As

two other judges in this district have found, that statement is overbroad and fails to give full effect to the holdings of *Ciccipio-Puleo* and *Acree*. *See Vine*, 459 F. Supp. 2d at 26 n.17; *Holland*, 2005 U.S. Dist. LEXIS 40254, at *40-*41. The *Dodge* decision therefore lacks persuasive value and need not be followed. For these reasons, the Court will grant in part Iraq's motion to dismiss and will dismiss Counts II and III of plaintiffs' Third Amended Complaint.

3. *Count I states a claim upon which relief can be granted*

Count I of plaintiffs' Third Amended Complaint seeks recovery for intentional infliction of emotional distress (hereinafter "IIED") under state common law. As Iraq recognizes, this Court in *Dammarell II* determined that the state law providing the rule of decision is generally the domicile of the plaintiffs at the time of the tortious conduct. *See* 2005 WL 756090, at *21; *see also Blais*, 459 F. Supp. 2d at 54 (same). Here, the parties appear to agree that the principles of state common law that govern are those of Florida (for the Barloon plaintiffs) and Oklahoma (for the Beaty plaintiffs). The parties share other common ground as well, acknowledging (1) that the highest courts of both Florida and Oklahoma have accepted the tort of intentional infliction of emotional distress, and (2) that those courts have adopted the definition of and limitations on that tort set forth in the Restatement (Second) of Torts § 46. Their agreement, however, ends there. Iraq contends that both states strictly enforce the Restatement's so-called "presence" requirement, and that because plaintiffs were not physically present when their fathers were taken and held as hostages and possibly tortured, they cannot recover for any emotional

distress that they may have suffered. *See* Restatement (Second) of Torts § 46(2)(a) ("Where such [extreme and outrageous] conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm."). Plaintiffs respond that the Restatement itself contemplates some exceptions to the presence requirement, *see id. Comment l*, and point to FSIA cases in this district in which this Court and other judges have relaxed that requirement either explicitly or implicitly.

Indeed, although the parties have framed the decisive issue in terms of the Restatement's "presence" requirement, courts in this district have permitted the close relatives of the victims of terrorist bombings to recover under an IIED cause of action without discussing the presence requirement. *See Dammarell v. Islamic Republic of Iran*, 404 F. Supp. 2d 261, 283, 285-86 (D.D.C. 2005) ("*Dammarell IV*"); *Salazar*, 370 F. Supp. 2d at 115 n.12 (citing *Burnett v. Al Baraka Inv. and Dev. Corp.*, 274 F. Supp. 2d 86, 107 (D.D.C. 2003), and *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 35 (D.D.C. 2001)); *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 50 (D.D.C. 2001). These decisions have endorsed the proposition that terrorist attacks such as bombing an embassy or holding someone hostage for an extended period are by their nature intended to harm not just those injured or killed at the time, but also the families of the injured. *Dammarell IV*, 404 F. Supp. 2d at 283; *Salazar*, 370 F. Supp. 2d at 115 n.12. In treating close relatives of victims as themselves direct victims

of the terrorist attacks, the courts have unmistakably (but only *implicitly*) applied § 46(1) of the Restatement, which governs direct victims and which has no presence requirement. The reasoning that supports treating absent relatives as direct victims is identical to the reasoning that supports relaxing the presence requirement. Accordingly, the Court will focus, as the parties do, on the presence requirement, at the same time explaining why Count I of plaintiffs' Third Amended Complaint states an IIED claim upon which relief can be granted under either form of analysis.

The parameters of the state-law inquiry are well settled. This Court is bound by the highest state court's construction of state law. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (per curiam) ("[T]he views of the State's highest court with respect to state law are binding on the federal courts."). Where the state courts have not addressed a question crucial to the resolution of a case before it, however, a federal court must answer that question as it believes the highest court of the state would. *See Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc.*, 420 F.3d 1317, 1326 n.5 (11th Cir. 2005) (noting that in the absence of binding precedent, the court's "objective [wa]s to determine issues of state law as [it] believe[d] the Florida Supreme Court would"); *Gibson v. Arnold*, 288 F.3d 1242, 1246 (10th Cir. 2002) (explaining that where issue of Oklahoma law had not been resolved by state courts, the federal court "must predict how the Supreme Court of Oklahoma would rule"). The Court is faced with just such an unresolved question of state law in this case—namely, whether the highest courts of Florida and Oklahoma would recognize a

cause of action for intentional infliction of emotional distress where plaintiffs who were minors at the time seek to recover for the severe anguish that they allegedly suffered when their fathers were detained and held as hostages in a foreign country.

In answering this question, the Court is free to "consider whatever might lend it insight, including relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand." *See Guideone Elite Ins. Co.*, 420 F.3d at 1326 n.5 (citation and quotations marks omitted); *accord Gibson*, 288 F.3d at 1246 (noting that the court could "consider all resources available, including decisions of [Oklahoma] courts, other state courts and federal courts, in addition to the general weight and trend of authority") (citation and quotation marks omitted) (alteration in original). These sources, and in particular previous decisions by this Court and other judges in this district, strongly suggest that Florida and Oklahoma courts would recognize an IIED cause of action under the circumstances of this case, whether by treating these plaintiffs as direct victims or by dispensing with the presence requirement.

Starting with Florida, that state's Supreme Court first recognized the IIED tort in *Metropolitan Life Ins. Co. v. McCarson*, 467 So.2d 277, 278 (Fla. 1985). The *McCarson* Court adopted the definition of the tort set forth in § 46 of the Restatement (Second) of Torts. Plaintiffs seeking to recover for IIED must establish the following four elements: (1) deliberate or reckless infliction of mental suffering, (2) outrageous conduct, (3) that the conduct caused the emotional distress, and (4) that the distress is severe.

See Williams v. City of Minneola, 575 So.2d 683, 691 (Fla. 5th Dist. Ct. App. 1991) (citation omitted); *see also Dammarell IV*, 404 F. Supp. 2d at 285. Iraq does not dispute that the allegations in the Third Amended Complaint, construed in the light most favorable to plaintiffs, suffice to establish each of these four elements. Rather, Iraq argues that "Florida courts have consistently hued to Section 46's requirement of physical presence and held that plaintiffs who are not present during an immediate relative's mistreatment do not state a claim for IIED." Def.'s Mem. at 16.

The Fifth District Court of Appeal's decision in *Williams*, however, belies that contention. As this Court has previously explained, the *Williams* court held "that a plaintiff could maintain an action for IIED based on the outrageous display of pictures of the dead body of a spouse, child, sibling, or parent, regardless of whether the plaintiff witnessed the outrageous conduct." *Dammarell IV*, 404 F. Supp. 2d at 285. That decision thus "tacitly acknowledged that some forms of outrageous behavior, though directed in the most immediate sense at one person, can be directed at others who are not present." *Id.*; *cf. Hatch v. Davis*, 147 P.3d 383, 388 (Utah 2006) (reasoning that the exception to the presence requirement "reflects the law's recognition that certain conduct not committed in one's presence can nevertheless be so injurious to an individual, despite the fact that he is not present to witness it, that our societal values would be offended were we not to provide a remedy at law."). Iraq insists that *Williams*, along with the decision in *Armstrong v. H & C Communications*, 575 So.2d 280, 282 (Fla. 5th Dist. Ct. App. 1991), should be read in the context of

"the 'unique considerations' Florida law applies to cases involving dead bodies." Def.'s Opp'n and Reply at 29 (quoting *Williams*, 575 So.2d at 694). But as Iraq concedes, this Court has declined to read *Williams* so narrowly, concluding that the Florida Supreme Court would recognize an IIED claim by a close relative of a terrorist-bombing victim even if the relative was not present at the bombing. *See Dammarell IV*, 404 F. Supp. 2d at 285; *see also Salazar*, 370 F. Supp. 2d at 115 n.12 (reaching the same conclusion under Illinois law and noting that "[c]ourts have uniformly held that a terrorist attack—by its nature—is directed not only at the victims but also at the victims' families"). Whether understood as an expansive interpretation of who the direct victims of outrageous conduct are or as a decision to dispense with the presence requirement in certain cases, *Williams* refutes Iraq's argument that Florida appellate courts would undoubtedly hold that "plaintiffs who are not present during an immediate relative's mistreatment do not state a claim for IIED." Def.'s Mem. at 16. Hence, the bounds of the IIED tort in Florida, at least as this Court has construed the relevant state decisions, are not nearly as limited as Iraq maintains.

The question then becomes whether the Florida courts would hold that the conduct alleged here—the hostage-taking and mistreatment of plaintiffs' fathers—also gives rise to a claim for IIED by close relatives not present at the time of the outrageous acts. A number of cases in this district pre-dating *Ciccipio-Puleo* suggest that the answer to this question is "yes." The first of these decisions is *Sutherland*, 151 F. Supp. 2d at 49-50. That case involved an American university professor who had

been kidnapped and held hostage in Lebanon for over six years. *Id.* at 31-37. Sutherland sued Iran for its role in the kidnapping, and his wife and three daughters brought claims for loss of consortium, intentional infliction of emotional distress, and loss of solatium. *Id.* at 45. Operating in the pre-*Ciccipio-Puleo* landscape, the *Sutherland* court applied a form of federal common law to the plaintiffs' claims, and accordingly evaluated the IIED claims brought by Sutherland and his wife under the Restatement § 46 standards. *Id.* at 47, 49. The court had "little hesitation in finding" that Sutherland had suffered severe emotional distress, that Iran had engaged in outrageous conduct, and that such conduct had caused Sutherland's emotional distress. *Id.* at 49. Whether that same conduct gave rise to a claim for Sutherland's wife was a closer question. Nevertheless, the court concluded that Iran had indeed caused Sutherland's wife emotional distress, either intentionally or recklessly:

> The Court finds that, when an organization takes someone hostage, it is implicitly intending to cause emotional distress among the members of that hostage's immediate family . . . . [A]n organization taking someone hostage implicitly believes that such emotional distress is substantially certain to result. These conclusions are based on the logical inference that a hostage without loved ones—that is, a hostage without those who will be emotionally distressed by his absence—is of no value at all to a hostagetaker. For without loved ones, there is nobody to pay for the hostage's release. And even if the hostage's country (rather than his family) pays for his

> release, a hostage's loved ones play a vital role in agitating for governmental action.

Id. at 50.

Although the *Sutherland* court neither mentioned the presence requirement nor distinguished between claims by direct victims under § 46(1) and those by third-parties under § 46(2), the same judge confronted the presence issue in another hostage-taking case decided just a few months later. *See Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27 (D.D.C. 2001), *aff'd sub nom. Bettis v. Islamic Republic of Iran*, 315 F.3d 325 (D.C. Cir. 2003). The issue in *Jenco* was whether the siblings, nieces, and nephews of another former hostage could recover for the emotional distress that their relative's captivity had allegedly caused them. *See* 154 F. Supp. 2d at 35. Referencing its analysis in *Sutherland*, the *Jenco* court explained that the Restatement imposed two requirements that relatives must satisfy before recovering for intentional infliction of emotional distress: they must qualify as close relatives, and they must normally be present at the time of the defendant's outrageous conduct. The *Jenco* court recognized that, in allowing Sutherland's wife to recover, it had carved out an exception to the presence requirement and thus "parted somewhat from the Restatement." *Id.* at 36. But the court had done so, it explained, "because the defendants' intent to distress her was quite implicit in the nature of the defendants' conduct." *Id.* Applying this same logic, the court determined that the *Jenco* plaintiffs who qualified as close relatives—the victim's siblings—could likewise recover even though they had not been present during their brother's detention and captivity. *Id.* That conclusion, the court reasoned,

was in accord "with the analysis of the leading and most recent tort treatise," which agreed that the presence requirement should not apply where "the defendants' conduct is sufficiently outrageous and intended to inflict severe emotional harm upon a person wh[o] is not present." *Id.* (quoting Dan B. Dobbs, *The Law of Torts* § 307, at 834 (2000)).

There is little reason to believe—and Iraq certainly has not provided any—that the Florida Supreme Court would reject the analysis employed in *Sutherland* and *Jenco* and would instead strictly enforce the presence requirement in a hostage-taking case such as this one. Were that court to do so, it would be rejecting an analysis and conclusion that other courts in this district have found persuasive and have followed. *See, e.g., Burnett v. Al Baraka Inv. and Dev. Corp.*, 274 F. Supp. 2d 86, 108 (D.D.C. 2003); *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 271 (D.D.C. 2003). Furthermore, even if the Florida courts were reluctant to analyze plaintiffs' claim under § 46(2) of the Restatement, Iraq has failed to present any justification for distinguishing this case from either *Dammarell IV*, where this Court concluded that the Florida Supreme Court would treat the close relatives of terrorist-bombing victims as direct victims of the outrageous conduct, *see* 404 F. Supp. 2d at 285, or from *Salazar*, where this Court allowed the daughter of a terrorist-bombing victim to recover even though she was not present at the time of the attack, *see* 370 F. Supp. 2d at 115 & n.12. Whether plaintiffs are viewed as direct victims of Iraq's outrageous conduct under Restatement § 46(1) or as third-party victims under Restatement § 46(2), therefore, this Court concludes that the Florida courts would hold that

plaintiffs' allegations state a cognizable claim for IIED.

For all of the reasons given in *Sutherland* and *Jenco*, moreover, the emotional distress suffered by the close relatives of hostages depends even less upon those relatives' presence at the scene of the tortious conduct than in an attack on a foreign embassy. The relatives' emotional distress rests in the fact that they cannot see or speak to the person taken hostage; that is, they suffer because they cannot be in their loved one's "presence." Hence, the very *raison d'etre* of the presence requirement—to draw a line limiting the cause of action to those persons who have "genuine[ly]" been harmed, *see* Restatement § 46, Comment l—evaporates when the underlying conduct is specifically intended to harm those who are not present. A recent state supreme court decision recognizing exceptions to the presence requirement makes just this point. *See Hatch*, 147 P.3d at 388. The *Hatch* court set forth three factors that factfinders may consider in deciding "whether conduct triggers" an exception to the presence element of an IIED claim: (1) the relationship of the target of the conduct to the plaintiff; (2) the relationship between the person committing the conduct and the plaintiff; and (3) the egregiousness of the conduct. *Id.* To these three factors the court added a fourth that an absent plaintiff *must* show—"that the conduct was undertaken, in whole or in part, with the intention of inflicting injury to the absent plaintiff." *Id.* Hostage-taking is the quintessential example of conduct "undertaken . . . with the intention of inflicting injury to" absent family members. *See id.*; *Sutherland*, 151 F. Supp. 2d at 50. Surely those who engage in hostage-taking

should not be shielded from liability on the basis of a prudential limitation that was never intended to be absolute and that has been relaxed for conduct that, while shocking, is far less egregious than the kind at issue here. *See, e.g., Cahalin v. Rebert*, 10 Pa. D. & C.3d 142, 150 (Pa. Dist. Ct. 1979) (declining to enforce the presence requirement where one parent conspired to kidnap a child and conceal the child's whereabouts from the other parent), *cited in Marlene F. v. Affiliated Psychiatric Med. Clinic*, 770 P.2d 278, 285 n.4 (Cal. 1989) (Arguelles, J., concurring); *see also Kajtazi v. Kajtazi*, 488 F. Supp. 15, 20 (E.D.N.Y. 1978) (allowing IIED claim by mother where father kidnapped child outside of her presence and fled the country). Accordingly, the Court concludes that Florida courts would recognize an exception to the presence requirement under the circumstances of this case.

The same conclusion follows with respect to Oklahoma, which, like Florida, has adopted Restatement (Second) Torts § 46 as the controlling standard for the IIED tort. *See Breeden v. League Servs. Corp.*, 575 P.2d 1374, 1376-78 (Okla. 1978). Oklahoma courts have identified the same four elements that IIED plaintiffs must establish: "(1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's conduct caused the plaintiff emotional distress; and (4) the resulting emotional distress was severe." *Computer Publ'n, Inc. v. Welton*, 49 P.3d 732, 735 (Okla. 2002). Iraq again does not contest that the allegations in the Third Amended Complaint, when construed in the light most favorable to plaintiffs, could establish these four elements. It instead hangs its hat on the

Restatement's presence requirement. As Iraq sees it, Oklahoma courts have never expressly addressed whether an absent plaintiff can state a claim for intentional infliction of emotional distress. But given the "narrow" interpretation that Oklahoma courts have otherwise given the IIED tort, Iraq insists that those courts would decline to dispense with the presence requirement, at least under the circumstances of this case *See* Def.'s Mem. at 17 (quoting *Welton*, 49 P.3d at 735); Def.'s Opp'n and Reply at 30.

For many of the reasons already given, the Court rejects Iraq's argument. First, another judge in this district recently predicted that Oklahoma courts would *not* enforce the presence requirement in an IIED suit brought by family members of American serviceman killed in a terrorist attack abroad. *See Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229, 354 (D.D.C. 2006). Assuming that prediction to be correct, it follows that Oklahoma courts would act similarly with respect to IIED claims based on hostage-taking, which present an even stronger case for either dispensing with the presence requirement or treating close relatives as direct victims. There is simply no reason to believe that an Oklahoma court adhering to § 46 of the Restatement would decline either to treat the close relatives of persons taken hostage by foreign governments or terrorist groups as direct victims of outrageous conduct, or to carve out an exception to the presence requirement for such people.

Finally, Iraq argues that the recent decision in *Reed v. Islamic Republic of Iran*, 439 F. Supp. 2d 53 (D.D.C. 2006), supports the proposition that some state courts would in fact enforce the presence

requirement for IIED claims arising from the kidnapping and torture of a relative. There are critical distinctions, however, between *Reed* and the present case. For one thing, Massachusetts law provided the rule of decision in *Reed*. *Id.* at 66. Massachusetts courts, though following § 46 of the Restatement, have placed a key gloss on the presence element, requiring a victim's family member to demonstrate that he or she had "substantial, contemporaneous knowledge" of the defendant's outrageous conduct. *Id.* at 66-67 (quoting *Nancy P. v. D'Amato*, 517 N.E.2d 824, 828 (Mass. 1988)). The *Reed* court relied exclusively on this judicial gloss in rejecting the plaintiff's IIED claim. *Id.* at 67 ("The element requiring substantial, contemporaneous knowledge of the defendant's act . . . bars the plaintiff from obtaining a default judgment as to this claim."). What is more, the plaintiff there admitted that he did not learn of his father's captivity and mistreatment until after his father had been released and had returned home. "The plaintiff's distress," the *Reed* court explained, "coincided with his father's behavior after his release and upon returning to the United States, rather than from the plaintiff having contemporaneous knowledge of his father's tribulations." *Id.* Here, in contrast, neither the Florida nor the Oklahoma courts have interpreted § 46 as imposing a "substantial, contemporaneous knowledge" requirement. And even if they did, plaintiffs aver in their Third Amended Complaint that they "were acutely aware of the circumstances surrounding their fathers' hostage-taking and mistreatment" at all times during the mens' captivity. Third Am. Comp. ¶ 23. Hence, plaintiffs would likely be able to satisfy a contemporaneous-knowledge requirement even if one

existed. Permitting plaintiffs to proceed with their IIED claims under Florida and Oklahoma law is therefore fully consistent with *Reed*.

C. Plaintiffs' Motion for Summary Judgment

The final issue is whether plaintiffs are entitled to partial summary judgment on the surviving count of their complaint. The merits of that issue, however, are largely obscured by a procedural morass created by a representation that plaintiffs' counsel made at the motions hearing and a series of procedural challenges levied by Iraq. Plaintiffs' written motion, though labeled as one for "summary judgment," was actually one for *partial* summary judgment on the issue of liability. That much is clear from the opening paragraph of the motion itself ("Plaintiffs hereby move . . . for an order granting summary judgment . . . as to liability"), the first paragraph of plaintiffs' Memorandum in support of their motion ("Plaintiffs . . . are entitled to partial summary judgment of liability as to all causes of action alleged in the Third Amended Complaint"), and the proposed order that plaintiffs attached to their motion. The proposed order specifically invoked Rule 56(c) of the Federal Rules of Civil Procedure, which permits courts to render "[a] summary judgment, interlocutory in character, . . . on the issue of liability alone although there is a genuine issue as to the amount of damages." Fed. R. Civ. P. 56(c). Having read these materials, the Court understood the issue to be rather straightforward: were plaintiffs entitled to partial summary judgment as to liability? In other words, had they established that there were no genuine issues of material fact in dispute with respect to whether Iraq (1) intentionally or recklessly (2) engaged in extreme and outrageous conduct (3)

that caused them (4) severe emotional distress, such that they were entitled to judgment as a matter of law? *See* Part B *supra*; *see also Williams*, 575 So.2d at 691; *Welton*, 49 P.3d at 735).

It is at this point that counsel's representation at the motions hearing acquires importance. Plaintiffs allege that they suffered severe emotional distress, and that this distress was "a direct result of their fathers' captivity." *See* Third Am. Compl. ¶¶ 22, 23, 29-31; Pls.' Rule 56.1 Stmt. ¶ 6. They did not, however, introduce any evidence—via, for example, affidavits from the plaintiffs themselves—beyond that which was presented during the earlier *Daliberti* litigation. And because plaintiffs were not parties in *Daliberti*, no evidence was introduced as to either their emotional response to their fathers' captivities or, assuming that they did suffer severe distress, whether that distress was caused by their fathers' predicament. Hence, toward the end of the motions hearing, the Court raised with counsel the concern that plaintiffs appeared to be "relying solely on the amended complaint" to establish the final two elements of the IIED cause of action. Prelim. Tr. at 58. The following colloquy ensued:

> MR. HALL: You're only going to the first two in the motion for summary judgment rules.
> THE COURT: Well, wait a minute. That's interesting. All four are elements of liability. I'm not talking about damages. All four are elements of liability. So you're only seeking summary judgment on the first and second elements of an [IIED claim], which are the intentional or reckless nature of it and the extreme or outrageous conduct?
> MR. HALL: Yes, that's right.

> THE COURT: Okay.
> MR. HALL: Because I think I'm obliged to ask for a partial summary judgment, or [Rule] 56(d) I think it is, you can deal with it on that level and then at some point we obviously have to offer you the evidence from the children as to the impact on them.

Id. As this passage reveals, counsel in essence conceded that plaintiffs had not established the final two elements of their IIED claim and were *not* entitled to summary judgment on the issue of liability. Counsel thus jettisoned plaintiffs' motion under Fed. R. Civ. P. 56(c) and instead asked the Court for what amounts to *partial* summary judgment, or what a leading treatise characterizes as a "partial summary adjudication." 10B C. Wright, A. Miller & M.K. Kane, Federal Practice and Procedure § 2737, at 324 (3d ed. 1998).

The substantive basis for a "partial summary adjudication" is Rule 56(d) of the Federal Rules of Civil Procedure. This rule permits a court that "finds that summary judgment cannot be granted because there are genuine issues of material fact to be tried, . . . to issue an order that specifies the facts that appear without substantial controversy," and thus "to salvage some results from the effort involved in the denial of a motion for summary judgment." *Id.* § 2737, at 311-12, 318; see also 11 James Wm. Moore et al., Moore's Federal Practice ¶ 56.40[2] (3d ed. 2003). Although Rule 56(d) has the salutary purpose of empowering courts "to withdraw sham issues from the case and to specify those facts that really cannot be controverted," 10B Wright, Miller & Kane § 2737, at 318, there is a division of authority over whether a party can make an independent motion for relief

under Rule 56(d). *Compare LaPrade v. Anderson*, Civ. A. No. 97-0010, 2006 WL 3469532, at *8 (D.D.C. Nov. 29, 2006) (endorsing the view that "'[t]here is no such thing as an independent motion under Rule 56(d)'") (quoting *Arado v. Gen. Fire Extinguisher Corp.*, 626 F. Supp. 506, 509 (N.D. Ill. 1985)), *with McDonnell v. Cardiothoracic & Vascular Surgical Assoc., Inc.*, Civ. A. No. 03-0079, 2004 WL 1234138, at *1-*3 (S.D. Ohio May 27, 2004) (relying on cases that endorse the opposite proposition).

There is significantly more consensus, however, regarding the power of a court that denies a motion for summary judgment under Rule 56(c) to issue an order under Rule 56(d) establishing certain facts as uncontroverted and limiting the issues to be tried. *See Singh v. George Washington Univ.*, 368 F. Supp. 2d 58, 68 (D.D.C. 2005) (denying the parties' summary judgment motions due to factual disputes on one element of a claim, but proceeding to evaluate the other elements because Rules 56(a) and 56(d) "contemplate a partial summary adjudication as to elements of a claim"); *see also* 10B Wright, Miller & Kane, Federal Practice and Procedure § 2737, at 316 (describing a Rule 56(d) order as "ancillary to a motion for summary judgment"). As mentioned above, plaintiffs' representation at the motions hearing obliges the Court to deny their motion for summary judgment under Rule 56(c), and to treat counsel's representation as an oral motion for an order under Rule 56(d). The question then becomes whether plaintiffs, through their pleadings and the one exhibit submitted in support of their motion, have established that the facts underlying the first two elements of their IIED claim are no longer in dispute. In answering that question and deciding

whether plaintiffs are entitled to a "partial summary adjudication," the Court will employ the familiar summary-judgment standard and will enter the requested order unless Iraq can point to "a genuine issue of material fact as it relates to a particular claim or aspect of a claim." 11 Moore's Federal Practice ¶ 56.40[2].

This is where Iraq's remaining procedural challenges come into play—"remaining" because the concession by plaintiffs' counsel effectively validates some challenges and moots others. Those challenges boil down to the contention that plaintiffs cannot get any relief—whether under Rule 56(c) or Rule 56(d)—solely on the basis of the facts alleged in their Third Amended Complaint and their Local Rule 56.1 statement. The facts alleged therein, Iraq points out, are supported only with references to Judge Oberdorfer's opinion in *Daliberti II*.

Whether couched in the terminology of the local rules or principles of preclusion law, however, Iraq's arguments lack merit. For one thing, it is far from clear that plaintiffs have actually failed to comply with the requirement in LCvR 56.1 (or the identically worded LCvR 7(h)) that all motions "for summary judgment . . . be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue, which shall include references to the parts of the record relied on to support the statement." The thrust of Iraq's argument is that the facts asserted in a Rule 56.1 statement cannot be accepted as true and/or undisputed if such assertions are supported only with reference to the complaint and a prior judicial opinion. What Iraq does not explain, however, is why citations to the complaint and to a another opinion

from the same court on the same underlying facts do *not* constitute "references to the parts of the record relied on to support the statement." After all, both the complaint and the *Daliberti II* opinion are "parts of the record" as that record stands today. The federal rules certainly allow plaintiffs to seek summary judgment on the basis of these materials, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (explaining that a summary judgment "motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied"), and Iraq has not pointed to any authority that would justify reading the local rule as imposing a more stringent standard. *See Burke v. Gould*, 286 F.3d 513, 519-20 (D.C. Cir. 2002) (explaining that the local rules are "to be construed in harmony with" the Federal Rules, and that "[a]lthough Local Rule 56.1 facilitates more precise identification of the record materials on which the parties rely, Rule 56(c) identifies the materials the court is to consider before granting summary judgment") (quoting LCvR 1.1(a)).

Moreover, if failure strictly to comply with the local rule is reason enough to penalize the offending party, then Iraq is by far the candidate more deserving of a sanction. Iraq's Rule 56.1 statement contains three paragraphs. The first assails plaintiffs' Rule 56.1 statement, while the second describes the difficulties that defense counsel has faced in communicating with the new Iraqi government. The third paragraph then concludes:

> Because of the absence of record citations by plaintiffs in their Rule 56.1 Statement, the absence of any record in this case, and the

> current situation in Iraq, defendant is not able to present a counterstatement as contemplated under LCvR 56.1 that addresses the facts the plaintiffs will need to establish to prove either jurisdiction or the merits of their claims, or to provide record citations relating to those facts.

Def.'s Rule 56.1 Statement ¶ 3. By its own account, then, Iraq has failed to provide the type of statement contemplated by the local rules, which allow the Court under such circumstances to "assume the facts identified by [plaintiffs] in [their] statement of facts [as] admitted." LCvR 56.1. But just as the Court declines to penalize the plaintiffs for less-than-perfect compliance with the local rules, it will not sanction Iraq, whose counsel has labored under highly unusual circumstances, for failing to provide a proper Rule 56.1 Statement.

It bears emphasizing, however, that the difficulties that counsel has encountered do not excuse Iraq's failure to lodge a challenge to any of the facts alleged by plaintiffs. For example, counsel could have brought its communication problems to the Court's attention and sought on that basis a stay of the obligation to respond to plaintiffs' motion for partial summary judgment. *See La Réunion Aérienne v. The Socialist People's Libyan Arab Jamahiriya*,—F. Supp. 2d —, 2007 WL 706938, at *6 (D.D.C. March 9, 2007) (granting foreign sovereign's request for a stay of the plaintiff's motion for summary judgment pending resolution of a motion to dismiss). Counsel may also have considered filing an affidavit pursuant to Fed. R. Civ. P. 56(f) requesting additional time for discovery. *See Pugh v. Socialist People's Libyan Arab Jamahiriya*, Civ. A. No. 02-2026, 2006 WL 2384915,

at *4 (D.D.C. May 11, 2006) (rejecting foreign state's procedural objections to summary judgment motion and noting that Rule 56(f) is the way for "a non-movant who wishes to postpone summary judgment to obtain further discovery"). But having failed to pursue these measures or other possible avenues of relief, and having failed (by its own admission) to conduct the necessary factual investigation, *see* Prelim. Tr. at 37, Iraq cannot create a factual dispute simply by critiquing plaintiffs' reliance on the *Daliberti II* opinion as a shortcut for the voluminous testimony and other evidence introduced in that default-judgment proceeding.

At bottom, the real question underlying the propriety of a Rule 56(d) order is whether the facts as found after the four-day bench trial in *Daliberti II* need to be relitigated here. In answering that they do, Iraq maintains that plaintiffs cannot seek to establish the facts governing this case under "the doctrine of offensive collateral estoppel." *See* Def.'s Opp'n and Reply at 32. Iraq is certainly correct that plaintiffs were not parties to the *Daliberti* litigation and that they cannot use principles of issue preclusion to bar Iraq from contesting the facts as found there. *See Arizona v. California*, 530 U.S. 392, 414 (2000) (recognizing that issue preclusion does not attach to default judgments) (citing Restatement (Second) of Judgments § 27, comment e, p. 257 (1982)). This argument carries little weight, however, because Iraq has not sought in any of its filings to contest the facts surrounding the kidnapping and detention of Beaty and Barloon. Nor does counsel's generic contention at the motions hearing that Iraq does not concede the facts suffice to create a factual dispute. Prelim. Tr. at 35. In short, plaintiffs'

reliance on the *Daliberti II* opinion as a shortcut for reproducing the evidentiary record from that case has not precluded Iraq from disputing any of the facts material to plaintiffs' surviving claim. Iraq has simply chosen not to do so.

For similar reasons, the decision in *Weinstein v. Islamic Republic of Iran*, 175 F. Supp. 2d 13 (D.D.C. 2001), is of little help to Iraq. In that default-judgment proceeding, Judge Lamberth (1) declined to take judicial notice of the findings of fact and conclusions of law previously issued in another default-judgment proceeding involving the same defendants and the same underlying facts, and (2) refused to hold that the defendants were "collaterally estopped from relitigating" the findings and conclusions from the earlier case. *Id.* at 16-17. Again, however, plaintiffs have not attempted to prevent Iraq from challenging the factual basis for their claims; Iraq has simply decided not to, or been unable to do so. And while there is some room for debate as to the power of courts to assume the truth of court proceedings that have been judicially noticed, *compare Estate of Heiser*, 466 F. Supp. 2d at 263, *and Salazar*, 370 F. Supp. 2d at 109 n.6, *with Howard v. Gutierrez*,—F. Supp. 2d—, 2007 WL 404352, at *9 n.5 (D.D.C. Feb. 6, 2007), *Weinstein* is also easily distinguishable in this regard. In declining to take judicial notice in that case, Judge Lamberth emphasized that, had the defendants entered an appearance either in the current or the previous case, "they almost certainly would dispute the accuracy of th[e] particular facts" found. 175 F. Supp. 2d at 17. Iraq, in sharp contrast, has entered an appearance here and, despite the opportunity to do so, has not "dispute[d] the accuracy of th[e]

particular facts" found in *Daliberti II*. Accordingly, Iraq's reliance on principles of issue preclusion generally, and on *Weinstein* specifically, is misplaced.

Finally, Iraq argues that the FSIA itself bars the Court from entering summary judgment in plaintiffs' favor. The statute prohibits district courts from entering a *default judgment* against a foreign state "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e). "Obviously," Iraq insists, "no less is required when a plaintiff seeks summary judgment against a foreign state that has entered an appearance." Def.'s Opp'n and Reply at 32. Although there is a strong argument that the statutory standard for entering a default judgment against an absent foreign sovereign does *not* apply to a motion for summary judgment actively opposed by a foreign state that has entered an appearance through counsel, the Court need not resolve this question because an order under Fed. R. Civ. P. 56(d) does not qualify as an entry of judgment. See 10B Wright, Miller & Kane, Federal Practice and Procedure § 2737, at 323 (citing 1948 Advisory Committee Notes to Rule 56).

Because the material facts underlying two elements of plaintiffs' IIED claim "exist without substantial controversy," and because plaintiffs have conceded that they are not yet entitled to judgment on the question of liability, the Court will deny their motion for partial summary judgment under Rule 56(c) but grant their oral motion for partial summary adjudication under Rule 56(d). The facts underlying the detention, imprisonment, and release of Kevin Beaty and William Barloon, as described in *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001)

("*Daliberti II*"), "shall be deemed established" for the purposes of all further proceedings in this case. See Fed. R. Civ. P. 56(d); 10B Wright, Miller & Kane, Federal Practice and Procedure, § 2737, at 323. These facts equate to those set forth in paragraphs 7-20 of the Third Amended Complaint, and paragraphs 1-3, 7-8, and 14-17 of plaintiffs' Rule 56.1 statement.

CONCLUSION

For the foregoing reasons, the Court grants in part and denies in part defendant's motion to dismiss, and grants in part and denies in part plaintiffs' motion for partial summary judgment. A separate order has been posted on this date.

/s/
JOHN D. BATES
United States District Judge

Dated: March 20, 2007

APPENDIX U

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBIN BEATY, et al., **Plaintiffs,** **v.** **REPUBLIC OF IRAQ,** **Defendant.**	**Civil Action No. 03-0215 (JDB)**

ORDER

Upon consideration of defendant's motion to dismiss; plaintiffs' motion for partial summary judgment; the Statements of Interest filed by the United States; the responses and replies thereto; the arguments presented at the motions hearing held on March 2, 2007; and the entire record herein; and for the reasons stated in the Memorandum Opinion issued on this date; it is this 20th day of March, 2007, hereby

ORDERED that defendant's motion to dismiss is **GRANTED IN PART** and **DENIED IN PART**; it is further

ORDERED that defendant's motion to dismiss Count I of the Third Amended Complaint is **DENIED**; it is further

ORDERED t defendant's motion to dismiss Counts II and III of the Third Amended Complaint is **GRANTED**, and these counts are dismissed with prejudice; it is further

ORDERED that plaintiffs' motion for partial summary judgment is **GRANTED IN PART** and **DENIED IN PART**; it is further

ORDERED that plaintiffs' motion for partial summary judgment as to liability pursuant to Fed. R. Civ. P. 56(c) is **DENIED**; it is further

ORDERED that plaintiffs' motion for partial summary adjudication pursuant to Fed. R. Civ. P. 56(d) is **GRANTED**, and the facts set forth in paragraphs 7-20 of the Third Amended Complaint, and paragraphs 1-3, 7-8, and 14-17 of plaintiffs' Rule 56.1 statement shall be deemed established for the purposes of all further proceedings in this case; and it is further

ORDERED that the parties shall appear for a Status Conference at 9:00 a.m. on April 24, 2007 to discuss further proceedings in this matter.

SO ORDERED.

_____/s/_____
JOHN D. BATES
United States District Judge

Dated: March 20, 2007

APPENDIX V

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-7057 **September Term, 2007**
03cv00215

Robin Beaty, *et al.*,
Appellees
v.
Republic of Iraq,
Appellant
United States of America,
Appellee

Filed On:
November 6, 2007
[1078597]

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges*

ORDER

Upon consideration of the petition for initial hearing en banc, the corrected brief of the United States in support of the petition for initial hearing en banc, the motion to strike the brief of the United

* Circuit Judges Brown and Kavanaugh would grant the petition for initial hearing on banc.

States, the oppositions thereto, and the alternative motion for leave to file the brief of the United States, it is

ORDERED that the motion to strike the brief of the United States be denied. It is

FURTHER ORDERED that the motion for leave to file the brief of the United States be granted. It is

FURTHER ORDERED that the petition for initial hearing en banc be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Deputy Clerk/LD

APPENDIX W

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT COURT OF COLUMBIA CIRCUIT

No. 07-7057 **September Term, 2007**

[1081679]
Robin Beaty, *et al.*,
Appellees
v.
Republic of Iraq,
Appellant

03cv00215

Filed On: November 21, 2007

BEFORE: Sentelle, Randolph and Brown, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The district court correctly held that the Republic of Iraq's sovereign immunity, waived or abrogated under 28 U.S.C. § 1605(a)(7), has not been restored under the Emergency Wartime Supplemental Appropriations Act ("EWSAA"), Pub. L. No. 108-11, 117 Stat. 559 (2003), and Presidential Determination 2003-23. *See Acree v. Republic of Iraq*, 370 F.3d 41, 51 (D.C. Cir. 2004). The merits of the

parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

APPENDIX X

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7175 Robert Simon, et al., Appellants v. Republic of Iraq, et al., Appellees Consolidated with 06-7178	**September Term, 2007** **03cv00691** **03cv00888** **Filed On: February 4, 2008 [1096994]**

BEFORE: Ginsburg, *Chief Judge*, and Sentelle and Brown, *Circuit Judges*

ORDER

Upon consideration of appellants' motion for leave to file motion for summary reversal or, in the alternative, to remand; appellee's motion to extend time to file a response thereto; enactment of the National Defense Authorization Act for Fiscal Year 2008, § 1083 of which strikes 28 U.S.C. § 1605(a)(7) and adds new § 1605A; and of the President's waiver, pursuant to § 1083(d) thereof, of "all provisions of section 1083 with respect to Iraq, and all agencies and instrumentalities thereof," President George W.

Bush, Memorandum of Justification for Waiver of Section 1083 of the National Defense Authorization Act for Fiscal Year 2008 with Respect to Iraq (Jan. 28, 2008), *available at* http://www.whitehouse.gov/news/releases/2008/01/2008 128-12.html, it is

ORDERED that the parties file simultaneous briefs of no more than 15 pages by February 19, 2008 at 4:00 p.m., addressing the effect upon this case, if any, of the new Act and of the President's waiver. In particular, the parties should address whether pending cases filed under former § 1605(a)(7) may proceed on the basis of that provision. All submissions must be served and filed by hand. It is

FURTHER ORDERED that the motion of the Republic of Iraq for an extension of time be dismissed as moot.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Cheri Carter
Deputy Clerk

APPENDIX Y

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 12, 2007 Decided June 24, 2008

No. 06-7175

ROBERT SIMON, ET AL.,
APPELLANTS

v.

REPUBLIC OF IRAQ, ET AL.,
APPELLEES

Consolidated with
06-7178

Appeals from the United States District Court
for the District of Columbia
(No. 03cv00691)
(No. 03cv00888)

Michael Rips argued the cause for appellants. With him on the briefs were *Stephen A. Fennell*, *Anthony F. Cavanaugh*, *Anthony A. Onorato*, *Justin B. Perri*, and *Alice Loughran*.

Eric J. Hecker, *Richard D. Emery*, and *Sarah Netburn* were on the brief for amici curiae Ethel Hurst, et al. in support of appellants.

Lawrence H. Martin argued the cause for appellees. With him on the briefs were *Gare A. Smith*, *Sarah A. Altschuller*, *Timothy B. Mills*, and *Jonathan S. Franklin*.

Before: SENTELLE, *Chief Judge*, and GINSBURG and BROWN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge*: The plaintiffs in these two consolidated actions sued Iraq, the Iraqi Intelligence Service, and Saddam Hussein (together, Iraq) alleging they had tortured and taken certain of them hostage during the 1990-91 Gulf War. The plaintiffs relied upon 28 U.S.C. § 1605(a)(7), the exception in the Foreign Sovereign Immunities Act (FSIA), § 1602 *et seq.*, that allowed for lawsuits against state sponsors of terrorism. The district court dismissed the actions as untimely and the plaintiffs appealed. Iraq defends the district court's interpretation of the time limitation in the FSIA and alternatively invokes the political question doctrine.

After this appeal was briefed and argued, the Congress passed the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, 122 Stat. 3, § 1083 of which revised the terrorism exception to sovereign immunity by repealing § 1605(a)(7) of Title 28 and adding a new exception to be codified at § 1605A of Title 28. Section 1083(d) of the NDAA granted the President the authority to waive § 1083 with respect to Iraq, which he promptly did.

For the reasons that follow, we conclude the plaintiffs may maintain these suits pursuant to § 1605(a)(7), and their cases are timely and justiciable. Accordingly, we remand these matters to the district court for further proceedings.

I. Background

In 1996 the Congress amended the FSIA to abrogate in certain respects the sovereign immunity of any foreign state the Secretary of State designates a sponsor of terrorism. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241-43 (codified at 28 U.S.C. § 1605(a)(7)); *see also* 28 U.S.C. § 1604 (granting immunity to foreign states, their agencies, and their instrumentalities). As amended, § 1605(a)(7) provided in part that a foreign state was not immune from an action for damages "for personal injury ... caused by an act of torture ... [or] hostage taking" to a U.S. national if the foreign state had been "designated as a state sponsor of terrorism ... at the time the act occurred" and the plaintiff had given the foreign state "a reasonable opportunity to arbitrate the claim." The statute defined torture and hostage taking, see §§ 1605(e), 1350 note, by reference to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, 1465 U.N.T.S. 85, and the International Convention Against the Taking of Hostages art. 1, Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 205.

The plaintiffs filed their actions in 2003 and duly invoked § 1605(a)(7). Their amended complaints alleged that in 1990 and 1991 the defendants had tortured certain of the plaintiffs and held them hostage, in violation of local, federal, and

international law; the other plaintiffs, members of the alleged victims' families, sued for intentional infliction of emotional distress. Iraq was at all relevant times a designated state sponsor of terrorism, 55 Fed. Reg. 37,793 (Sept. 13, 1990), and the complaints alleged the plaintiffs had offered Iraq the opportunity to arbitrate the disputes.

Iraq and the Iraqi Intelligence Service filed motions to dismiss both cases on the grounds that the actions were untimely under § 1605(f), which provides a limitation period of ten years for any action under § 1605(a)(7); the plaintiffs had failed to state a claim upon which relief could be granted; and the political question doctrine barred the court from proceeding. The district court held the two actions did not raise political questions but dismissed them as untimely. *Vine v. Republic of Iraq*, 459 F. Supp. 2d 10 (2006).

II. Analysis

On appeal, Iraq newly contends the recent enactment of the NDAA and the President's waiver of § 1083 thereof require the dismissal of these cases. Alternatively, Iraq argues the cases were untimely filed and are barred by the political question doctrine. Addressing the issues of law *de novo*, we reject each of Iraq's contentions.

A. NDAA 2008

On December 14, 2007 the Congress passed the first version of the NDAA, § 1083 of which would have amended the terrorism exception to foreign sovereign immunity by striking 28 U.S.C. § 1605(a)(7), the exception upon which the plaintiffs relied, and enacting a new exception, to be codified at 28 U.S.C. § 1605A. President Bush sought to "pocket

veto" the bill because he believed § 1083 would threaten the reconstruction of Iraq:

> [S]ection 1083 would risk the freezing of substantial Iraqi assets in the United States .... Section 1083 also would expose Iraq to new liability of at least several billion dollars by undoing judgments favorable to Iraq, by foreclosing available defenses on which Iraq is relying in pending litigation, and by creating a new Federal cause of action backed by the prospect of punitive damages to support claims that may previously have been foreclosed.

Memorandum of Disapproval, 43 WEEKLY COMP. PRES. DOC. 1641, 1641 (Dec. 28, 2007).

The Congress subsequently passed a revised version of the NDAA, which included a new provision (§ 1083(d)) that authorized the President, upon making certain findings, to "waive any provision of [§ 1083 of the NDAA] with respect to Iraq." The President signed that bill into law and promptly exercised his authority under § 1083(d)(1) to waive "all provisions of section 1083 with respect to Iraq, and all agencies and instrumentalities thereof." Presidential Determination No. 2008-9, 73 Fed. Reg. 6571 (Jan. 28, 2008).* Iraq contends the enactment of the NDAA and the President's waiver of § 1083 with

* The President had to and did find that "waiver is in the national security interest of the United States" and "will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq," and that "Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism." NDAA § 1083(d)(1); *see* 73 Fed. Reg. at 6571 (so finding).

respect to Iraq stripped the federal courts of jurisdiction over these cases; the plaintiffs disagree, of course.

Section 1083(a) of the NDAA, which amended the FSIA by creating new § 1605A of Title 28, contains an exception to the grant of sovereign immunity similar to that in former § 1605(a)(7) but more advantageous to plaintiffs in several respects. For instance, it precludes a foreign state from filing an interlocutory appeal under the "collateral order" doctrine, § 1605A(f), and permits a plaintiff to attach property in advance of judgment, § 1605A(g). In addition, § 1605A(c) abrogates *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004), by creating a federal right of action against foreign states, for which punitive damages may be awarded.

Iraq argues that because § 1083(b)(1) of the NDAA repeals § 1605(a)(7) of the FSIA, upon which the present cases were founded, we must dismiss these cases for want of jurisdiction. *See* 28 U.S.C. §§ 1330(a), 1604 (jurisdiction over case against foreign sovereign depends upon exception to immunity). Further, according to Iraq, the President's waiver of § 1083 of the NDAA prevents the plaintiffs from refiling their cases under the jurisdiction conferred by new § 1605A.

A statute removing federal jurisdiction presumptively applies to pending cases because such a statute "usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2765 (2006) (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)); *see also Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997). In

contrast, a statute that retroactively alters the consequences of primary conduct—as by "impair[ing] rights a party possessed when he acted, increas[ing] a party's liability for past conduct, or impos[ing] new duties with respect to transactions already completed," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)—is presumptively nonretroactive; such a statute applies to a pending case only if the Congress clearly so provides.

The FSIA speaks to the jurisdiction of the federal courts, but it also governs the immunity of foreign states in any U.S. forum. *See* 28 U.S.C. § 1604 ("a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter"); *cf. Hughes Aircraft Co.*, 520 U.S. at 951 ("statutes affect[ing] ... whether [a suit] may be brought at all ... speak[] not just to the power of a particular court but to the substantive rights of the parties as well" and are therefore "subject to [the] presumption against retroactivity"). Accordingly, it is not clear which presumption might apply, if any is needed. In this case, however, it is unnecessary to invoke either presumption because § 1083 makes several references to pending cases and we need not look beyond the text and structure of the NDAA to ascertain its effect upon cases brought under § 1605(a)(7). *Accord Hamdan*, 126 S. Ct. at 2762-69 (holding, based upon "[o]rdinary principles of statutory construction," the provision of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Title X, 119 Stat. 2680, 2739-44, that deprived the courts of jurisdiction over habeas petitions filed by persons detained at Guantánamo Bay did not apply to habeas cases pending when it was enacted). For the reasons

that follow, we conclude that the courts retained jurisdiction over cases pending pursuant to former § 1605(a)(7) when the Congress enacted the NDAA. *Cf. Republic of Austria v. Altmann*, 541 U.S. 677, 697-700 (2004) (applying ordinary principles of construction to decide whether FSIA, which codified immunity of foreign sovereigns, applies to conduct predating statute).

We note first that the new terrorism exception in § 1605A by its terms does not provide a substitute basis for jurisdiction over all cases pending under § 1605(a)(7) when § 1605A replaced it. The new provision deprives a foreign sovereign of immunity to suit only if

> (I) the foreign state was designated as a state sponsor of terrorism at the time the act [giving rise to the suit] occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or
>
> (II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the [NDAA for] 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) ... was filed.

28 U.S.C. § 1605A(a)(2)(A)(i). Inasmuch as this provision expressly distinguishes between cases "filed under this section"—*i.e.*, § 1605A—and cases "filed under section 1605(a)(7)" of the pre-amendment Act, a pending case obviously cannot be said to have been "filed under" the new provision. Therefore, the plaintiff in a case pending under § 1605(a)(7) may not maintain that action based upon the jurisdiction conferred by § 1605A; in order to claim the benefits of § 1605A, the plaintiff must file a new action under that new provision.

Because the courts have no jurisdiction of a case against a foreign sovereign absent an exception to the grant of immunity in the FSIA, and because § 1605A does not provide that exception for pending cases, Iraq contends the NDAA requires the dismissal of these cases. The plaintiffs, on the other hand, argue that § 1605(a)(7) remains a viable exception to immunity for cases, such as these, filed when it was the source of our jurisdiction. Based upon the following analysis of NDAA §§ 1083(c) ("Application to Pending Cases") and 1083(d) ("Applicability to Iraq"), we hold the courts retain jurisdiction pursuant to § 1605(a)(7) over cases that were pending under that section when the Congress enacted the NDAA.

Section 1083(c)(1). The first subsection of § 1083(c) provides: "The amendments made by this section [1083] shall apply to any claim arising under section 1605A." Because, as we have said, a claim pending under former § 1605(a)(7) when the NDAA became law did not "aris[e] under section 1605A," *cf. Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) ("A suit arises under the law that creates the cause of action"), it is apparent that the 2008

amendments, including the "conforming amendments" that strike former § 1605(a)(7), *see* NDAA § 1083(b), do not apply to any claim then "pending" under that provision. Moreover, reading the Act to extinguish jurisdiction over cases pending under § 1605(a)(7) when the NDAA became law would render § 1083(c)(1) nugatory: There would be no need to specify "the amendments ... apply to any claim arising under section 1605A" for the amendments obviously would apply to any such claim and could apply to no other claim; as we interpret it, however, § 1083(c)(1) makes clear the "amendments" apply to any claim under § 1605A, but to no "pending" claims.*

Sections 1083(c)(2) and (c)(3). Plaintiffs with "pending cases" may invoke new § 1605A in certain circumstances. Pursuant to § 1083(c)(2) ("Prior Actions"), a plaintiff who detrimentally "relied upon" former § 1605(a)(7) of the FSIA "as creating a cause of action" and whose action was "pending before the courts in any form" when the NDAA became law was given 60 days within which to "refile" his suit based upon the new cause of action created by § 1605A(c). *See also* 28 U.S.C. § 1605A(a)(2)(A)(i)(II) (providing exception to immunity for "original action" that is "refiled ... by reason of section 1083(c)(2)(A)"). Section 1083(c)(3) of the NDAA ("Related Actions") authorizes a plaintiff who had "timely commenced" a "related action" under § 1605(a)(7) to bring "any other action arising out of the same act or incident," provided "the [new] action is commenced" within 60 days from the later of "(A) the date of the entry of

* In consequence, only a plaintiff prosecuting an action under new § 1605A of the FSIA can claim the benefits of that section, such as prejudgment attachment of the defendant's property.

judgment in the original action or (B) the date of the enactment of [the NDAA]."

These "transition rules," as Iraq calls them, cannot be squared with Iraq's position that the NDAA requires the dismissal of pending cases. The 60-day limit in § 1083(c)(3) implies a court could, after enactment of the NDAA, still enter judgment in an action filed under § 1605(a)(7). Iraq argues that in this context "entry of judgment" means only dismissal for want of jurisdiction rather than the entry of a judgment on the merits, but nothing in the text of § 1083 suggests the phrase has such a narrow meaning, *cf.* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "judgment" to mean judgment on the merits), and the structure of the NDAA indicates precisely the opposite. New § 1605A(a)(2)(A)(i)(II) of the FSIA refers to a pending "original action" being "refiled ... by reason of section 1083(c)(2)(A)" of the NDAA while referring to a new action being "filed ... by reason of section 1083(c)(3)" if a pending "related action" had been timely commenced, *see* 28 U.S.C. § 1605A(b), which implies the Congress understood that the courts would retain jurisdiction over the original "related action" described in § 1083(c)(3). That explains why the 60-day period for invoking § 1083(c)(2) began with the enactment of the NDAA, *see* § 1083(c)(2)(C)(ii), whereas the 60-day period in § 1083(c)(3) may run from "the date of the entry of judgment" in the "related action," which could be well after the enactment of the NDAA.

There would be no reason for the Congress to have tied the 60-day period in § 1083(c)(3) to the date of "entry of judgment" in a case pending under § 1605(a)(7) when the NDAA became law if, as Iraq argues, the quoted words mean only a dismissal for

want of jurisdiction and the Act requires the dismissal of all pending cases. The text and structure of the NDAA thus compel the conclusion that, notwithstanding the enactment of the NDAA, a court still may enter a judgment on the merits in such a case, which it could not do if it did not have jurisdiction over the case. *See, e.g.*, *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause"). Because new § 1605A is inapplicable, that jurisdiction over pending cases can be founded only upon former § 1605(a)(7).*

Section 1083(c)(4). The final provision of § 1083(c) also is instructive. In 2003 the President acted under the Emergency Wartime Supplemental Appropriations Act of 2003 (EWSAA), Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579, to "make inapplicable with respect to Iraq ... any ... provision of law that applies to countries that have supported terrorism." Presidential Determination No. 2003-23, 68 Fed. Reg. 26,459 (May 7, 2003).

In *Acree v. Republic of Iraq*, 370 F.3d 41 (2004), however, we held that the EWSAA did not authorize the President to suspend former § 1605(a)(7) with

* Iraq argues also that the 60-day rule authorizes the refiling of claims under § 1605A within 60 days following the date of entry of "judgment on claims involving non-sovereign parties or a different exception to sovereign immunity unaffected by Section 1083." That is clearly wrong. The 60-day period is tied to "the date of the entry of judgment in [an] original action" that was "timely commenced under section 1605(a)(7)," NDAA § 1083(c)(3); § 1605(a)(7) permits suits only against sovereign states, leaving no room for a case brought under "a different exception to sovereign immunity."

respect to Iraq. Paragraph (4) ("Preserving the Jurisdiction of the Courts") of subsection 1083(c) ("Application to Pending Cases") ratifies that holding: "Nothing in section 1503 of the [EWSAA] ... has ever authorized" the President to "mak[e] inapplicable ... any provision of [the FSIA or to] remov[e] ... the jurisdiction" of the federal courts. Thus both the text and the context of this provision make clear the Congress was intent upon "preserving" the courts' jurisdiction over "pending cases," which could only mean cases filed under former § 1605(a)(7).

Section 1083(d)(1). This section authorizes the President to "waive any provision of ... section [1083 of the NDAA] with respect to Iraq." If a suit against Iraq for terrorist acts could proceed only under § 1605A, as Iraq maintains, then the President could use § 1083(d)(1) to deprive the courts of jurisdiction and would have no reason ever to invoke the EWSAA; § 1083(c)(4) would be surplusage. *Cf. Duncan v. Walker*, 533 U.S. 167, 174 (2001) (we must "give effect ... to every clause and word of [the] statute").* Moreover, § 1083(d)(2)(C), which provides that the President's waiver authority applies "regardless of whether ... that authority affects any action filed before ... enactment of the [NDAA]," would be unnecessary if the Act deprived the courts of jurisdiction over pending cases.

Reading the NDAA, as we do, to leave intact jurisdiction over cases pending under former

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* Iraq has not been designated a state sponsor of terrorism since 2004. 69 Fed. Reg. 61,702 (Oct. 20, 2004). Accordingly, even absent the President's waiver, no new action could have been filed against Iraq unless a prior or a related action was pending. See 28 U.S.C. § 1605A(a)(2)(A)(i).

§ 1605(a)(7) gives meaning both to § 1083(c)(4) and to § 1083(d) and makes sense of the relation between them. Section 1083(c)(4) clarifies that the President has no authority under the EWSAA to limit the jurisdiction of the courts over cases against Iraq. Section 1083(d)(1) then grants the President the authority to render inapplicable those provisions of the NDAA to which President Bush had objected when he vetoed the first version of the NDAA.*

. . .

Cognizant of the President's concerns and of the potential implications of our holding upon the foreign affairs of the United States, we do not lightly conclude the NDAA leaves intact our jurisdiction over cases, such as these, that were pending against Iraq when the Congress enacted the NDAA. Nonetheless, the NDAA fairly compels the conclusion that the plaintiffs may proceed on the basis of former § 1605(a)(7). It follows that the President's waiver of § 1083 of the NDAA with respect to Iraq affects neither the jurisdiction of the district court over cases pending under § 1605(a)(7) nor the issues presented on this appeal.**

B. Timeliness

The jurisdictional provision upon which the plaintiffs rely contains a limitation period:

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* The President raised the same concerns when he exercised his waiver authority. 73 Fed. Reg. 6571 (discussing same non-jurisdictional implications).

** We have no occasion, therefore, to address the plaintiffs' alternative argument that the President left § 1605(a)(7) intact by waiving "all" provisions of § 1083 including subsection (b)(1)(A)(iii), which repeals former § 1605(a)(7).

> No action shall be maintained under [§ 1605(a)(7)] unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

28 U.S.C. § 1605(f) (2007). The plaintiffs contend their actions, which they filed in 2003, are timely even though the alleged torts occurred more than ten years earlier, in 1990 and 1991. They argue first that their causes of action did not arise, and the ten-year limitation therefore did not begin to run, until 1996, because they could not have sued Iraq before then. They contend alternatively that the ten-year limitation period was equitably tolled until 1996; more precisely, they argue § 1605(f) requires that we extend the period of limitation by "the period during which [Iraq] was immune from suit." We agree with their alternative argument and, accordingly, need not reach the (rather strained) argument that their claims did not arise until 1996.

Section 1605(f) expressly incorporates "principles of equitable tolling." Iraq argues—and we do not disagree—the statute thereby incorporates the relevant common law. According to Iraq that means the plaintiffs are entitled only to a "reasonable" extension of the statute of limitations, *Phillips v. Heine*, 984 F.2d 489 (D.C. Cir. 1993); the suits would then be untimely—assuming, as we do for the sake of the argument, the plaintiffs' causes of action arose in 1990 and 1991—because the plaintiffs have not demonstrated they reasonably required an extension

to 2003, two or three years beyond the expiration of the statute of limitations, in order to bring their cases.

It seems, however, we have not applied the doctrine of equitable tolling consistently in the manner Iraq suggests. In *Phillips*, upon which Iraq relies, we held that "tolling does not bring about an automatic extension of the statute of limitations by the length of the tolling period. ... It gives the plaintiff extra time only if he needs it," 984 F.2d at 492; that is, the plaintiff obtains a "reasonable" extension. In *United States v. Saro*, 252 F.3d 449 (2001), in contrast, we held that equitable tolling stops the clock for the duration of a tolling event. *Id.* at 454 (citing *United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991) (dictum)); *see* Calvin W. Corman, Limitation of Actions § 8.2 (1991) ("When the commencement of an action is stayed due to statutory prohibition, the period of the stay is not included in the calculation of the limitation period"); *cf. Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 434-35 (1965) (equitable tolling, rather than giving plaintiff a "reasonable" extension of statute of limitations in FELA, stops clock for duration of tolling event).

Saro and *Phillips* undoubtedly conflict, and our subsequent cases do not resolve the conflict. In *Chung v. DOJ*, upon holding the distinct doctrine of equitable estoppel (which is based upon the conduct of the defendant) did not extend the statute of limitations on the facts of that case, we left it to the district court on remand to decide, à la *Phillips*, whether the plaintiff was entitled to a "reasonable" extension of the statute of limitations under the doctrine of equitable tolling. 333 F.3d 273, 278-80 (2003). We did not notice the conflict between *Saro*

and *Phillips*. We now see not only the intra-circuit but also an inter-circuit inconsistency. *Compare Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir. 1991) (tolling provides a reasonable extension), with *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1193-96 (9th Cir. 2001) (en banc) (tolling stops the clock).

We need not resolve our home-grown conflict in this case because the statute is clear: We "include," i.e., add, "the period during which [Iraq] was immune from suit"; hence cases filed in 2003 are timely.* Iraq asserts that, because we narrowly interpret the waiver of immunity by a sovereign state, *see, e.g.*, *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94 (1990) (waiver by the United States); *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1162 (D.C. Cir. 2002) (waiver by foreign state), we ought strictly to interpret § 1605(f) and limit Iraq's exposure by following *Phillips*. Cases on the scope of a waiver with its consequences for the fisc are inapposite, however, for the Congress did not waive Iraq's sovereign immunity in enacting § 1605(a)(7); only the sovereign can forswear the sovereign's legal rights. In the terrorism exception the Congress qualified the statutory grant of immunity to Iraq, itself a matter of "grace and comity." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). Iraq has pointed to no authority suggesting the Congress intended

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* Nor need we decide whether the statute would call for the application of state rather than federal common law, whatever the latter may be, with regard to equitable tolling. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); 28 U.S.C. § 1652; *see also United States v. Yazell*, 382 U.S. 341 (1966) (applying state law in interstices of federal statute).

courts to read § 1605(f) any more narrowly than its terms suggest; nor are we aware of any case in which a court presumed or suggested exceptions to foreign sovereign immunity should be construed narrowly. *Cf. Saudi Arabia v. Nelson*, 507 U.S. 349, 356-58 (1993) (using ordinary methods of construction to interpret exception in § 1605(a)(2)).

We are therefore left to interpret the plain text of § 1605(f) unencumbered by any special canons of construction, and the text makes clear Iraq's interpretation must fail. Section 1605(f) invokes the "principles of equitable tolling" and expressly requires that in "calculating [the ten-year] limitation period" we "includ[e] the period during which [Iraq] was immune from suit." To say the plaintiffs were entitled only to a reasonable term after the ten-year period ran out in 2000 or 2001 would not fulfill the mandate that we "includ[e]" the five or six years of Iraq's immunity in the calculation of the limitations period. Thus, to read the statute as Iraq insists would deprive the quoted phrases of their plain meaning.

The Congress first amended the FSIA to add a terrorism exception in 1996, before which Iraq was "immune from suit"; hence the limitation period in § 1605(f) began to run in 1996 and expired in 2006. Accordingly, the plaintiffs timely filed their actions in 2003.

C. Political Question Doctrine

Iraq asserts that the present cases are barred by the political question doctrine, for which proposition it points to several of the President's statements suggesting this action is contrary to the foreign

policy of the United States.* We have already noted and quoted Presidential Determination 2003-23 under the EWSAA. 68 Fed. Reg. 26,459. The President also issued Executive Order 13,303 declaring that "the threat of attachment or other judicial process" against Iraqi oil interests "obstructs the orderly reconstruction of Iraq," 68 Fed. Reg. 31,931 (May 22, 2003), and sent a message to the Congress stating that he had used his authority under the EWSAA to make § 1605(a)(7) inapplicable to Iraq because the "threat of attachment or other judicial process" against Iraqi oil assets "constituted an unusual and extraordinary threat to the national security and foreign policy of the United States." 39 WEEKLY COMP. PRES. DOC. 647, 647-48 (May 22, 2003).

In addition, Iraq points to an unenacted version of the Foreign Relations Authorization Act of 2004, *see* S. 925, 108th Cong. § 811 (2003), asserting that the Congress "voiced its support for the President's determination" that suits such as these are contrary to the foreign policy of the United States. The Senate Foreign Relations Committee approved that bill, but the Committee does not speak for the Congress, which last spoke to this subject when it enacted the NDAA. Therefore, we confine our analysis to the

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* Iraq's principal argument does not assume the President's statements have the force of law. Iraq's alternative argument is that certain of those statements do have the force of law because the President was acting under the EWSAA. Our decision in *Acree*, of course, renders the latter argument beyond the reach of the panel and Iraq makes it only to preserve it for rehearing by the court en banc. For the same reason, we do not address Iraq's further argument that the President has waived § 1083(c)(4) of the NDAA with respect to Iraq; even if the statute were waived, the panel would still be bound by *Acree*.

President's position that the threat of a monetary judgment against Iraq contravenes the foreign policy of the United States.

The federal courts may not pass upon a question the Constitution commits to the political branches. *See Baker v. Carr*, 369 U.S. 186, 217 (1962); *see also id.* at 211-13. In *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005), for instance, foreign plaintiffs alleged that Japanese soldiers had subjected them to torture and sexual slavery in violation of international law. Japan and the plaintiffs debated whether the treaties between Japan and the countries from which the plaintiffs came extinguished their claims. We held the political branches alone could resolve that dispute because it "concerns the United States only with respect to her foreign relations." *Id.* at 51-52.

To be sure, the foreign policy considerations Iraq raises are important, as the President's actions and statements make clear. But Iraq has not explained how adjudicating the question whether Iraq committed acts of torture and hostage taking in 1990-91 requires the court to address any question the Constitution commits to the political branches. Indeed, Iraq does nothing more than assert that this action may affect the foreign relations of the United States, but that is surely not enough. *Baker*, 369 U.S. at 211 ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance"). The political question doctrine does not call upon us to decide whether a lawsuit that raises only justiciable questions contravenes the foreign policy of the United States; if the political branches decide tort suits against a foreign sovereign are contrary to the foreign policy of

the Nation, then they may by law remove them from our jurisdiction.

Nor has Iraq explained how the President, by making general statements or taking actions not specific to these cases, can set to naught a duly enacted jurisdictional statute. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634, 637-38 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject."); *see also Altmann*, 541 U.S. at 702 (noting the FSIA "might well" require a court to defer to a statement of interest filed by the Department of State in a particular case). The Congress has given the courts of the United States the jurisdiction to decide the legal issues and factual questions raised by the plaintiffs' allegations, which sound in tort; accordingly the courts have the duty to proceed to the extent the actions are justiciable. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should"). The present actions undoubtedly present questions fit for judicial determination under Article III—to wit, whether in 1990-91 Iraq committed the torts alleged—regardless whether their resolution might affect the foreign relations of the Nation.

III. Conclusion

In sum, we hold that neither § 1083 of the NDAA nor the President's waiver under § 1083(d) thereof deprives the courts of jurisdiction over these cases, which were pending under § 1605(a)(7) when the NDAA went into effect. Because the instant actions were timely filed and justiciable, we reverse the judgment of the district court and remand these cases to the district court for further proceedings consistent herewith.

So ordered.

APPENDIX Z

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7175 ROBERT SIMON, ET AL., APPELLANTS v. REPUBLIC OF IRAQ, ET AL., APPELLEES Consolidated with 06-7178	**September Term, 2007** FILED ON: JUNE 24, 2008

Appeals from the United States District Court
for the District of Columbia
(No. 03cv00691)
(No. 03cv00888)

Before: SENTELLE, *Chief Judge*, and GINSBURG, and BROWN, *Circuit Judges*.

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in these causes is hereby reversed and the cases are remanded for further proceedings, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

Date: June 24, 2008

Opinion for the court filed by Circuit Judge Ginsburg

APPENDIX AA

Foreign Assistance Act of 1961, Pub. L. 87-195, § 307, 75 Stat. 424 (1961), codified as amended at 22 U.S.C. § 2227

Sec. 307. Withholding of United States Proportionate Share for Certain Programs of International Organizations—(a) Notwithstanding any other provision of law, none of the funds authorized to be appropriated by this chapter shall be available for the United States proportionate share for programs for Burma, Iraq, North Korea, Syria, Libya, Iran, Cuba, or the Palestine Liberation Organization or for projects whose purpose is to provide benefits to the Palestine Liberation Organization or entities associated with it, or at the discretion of the President, Communist countries listed in section 620(f) of this Act.

(b) The Secretary of State—

(1) shall review, at least annually, the budgets and accounts of all international organizations receiving payments of any funds authorized to be appropriated by this chapter; and

(2) shall report to the appropriate committees of the Congress the amounts of funds expended by each such organization for the purposes described in subsection (a) and the amount contributed by the United States to each such organization.

(c)(1) Subject to paragraph (2), the limitations of sub-section (a) shall not apply to contributions to the

International Atomic Energy Agency or the United Nations Children's Fund (UNICEF).

(2)(A) Except as provided in subparagraph (B), with respect to funds authorized to be appropriated by this chapter and available for the International Atomic Energy Agency, the limitations of subsection (a) shall apply to programs or projects of such Agency in Cuba.

(B)(i) Subparagraph (A) shall not apply with respect to programs or projects of the International Atomic Energy Agency that provide for the discontinuation, dismantling, or safety inspection of nuclear facilities or related materials, or for inspections and similar activities designed to prevent the development of nuclear weapons by a country described in subsection (a).

(ii) Clause (i) shall not apply with respect to the Juragua Nuclear Power Plant near Cienfuegos, Cuba, or the Pedro Pi Nuclear Research Center unless Cuba—

(I) ratifies the Treaty on the Non-Proliferation of Nuclear Weapons (21 UST 483) or the Treaty for the Prohibition of Nuclear Weapons in Latin America (commonly known as the Treaty of Tlatelolco);

(II) negotiates full-scope safeguards of the International Atomic Energy Agency not later than two years after ratification by Cuba of such Treaty; and

(III) incorporates internationally accepted nuclear safety standards.

(d)(1) Notwithstanding subsection (c), if the Secretary of State determines that programs and

projects of the International Atomic Energy Agency in Iran are inconsistent with United States nuclear nonproliferation and safety goals, will provide Iran with training or expertise relevant to the development of nuclear weapons, or are being used as a cover for the acquisition of sensitive nuclear technology, the limitations of subsection (a) shall apply to such programs and projects, and the Secretary of State shall so notify the appropriate congressional committees (as defined in section 3 of the Foreign Relations Authorization Act, Fiscal Year 2003).

(2) A determination made by the Secretary of State under paragraph (1) shall be effective for the 1-year period beginning on the date of the determination.

APPENDIX AB

Foreign Assistance Act of 1961, Pub. L. 87-195, § 620A, 75 Stat. 424 (1961), codified as amended at 22 U.S.C. 2371

Sec. 620A. Prohibition on Assistance to Governments Supporting International Terrorism.

(a) PROHIBITION—The United States shall not provide any assistance under this Act, the Agricultural Trade Development and Assistance Act of 1954, the Peace Corps Act, or the Export-Import Bank Act of 1945 to any country if the Secretary of State determines that the government of that country has repeatedly provided support for acts of international terrorism.

(b) PUBLICATION OF DETERMINATIONS—Each determination of the Secretary of State under subsection (a), including each determination in effect on the date of the enactment of the Antiterrorism and Arms Export Amendments Act of 1989, shall be published in the *Federal Register*.

(c) RESCISSION—A determination made by the Secretary of State under subsection (a) may not be rescinded unless the President submits to the Speaker of the House of Representatives and the Chairman of the Committee on Foreign Relations of the Senate—

(1) before the proposed rescission would take effect, a report certifying that—

(A) there has been a fundamental change in the leadership and policies of the government of the country concerned;

(B) that government is not supporting acts of international terrorism;

(C) that government has provided assurances that it will not support acts of international terrorism in the future; or

(2) at least 45 days before the proposed rescission would take effect, a report justifying the rescission and certifying that—

(A) the government concerned has not provided any support for international terrorism during the preceding 6-month period; and

(B) the government concerned has provided assurances that it will not support acts of international terrorism in the future.

(d) WAIVER—Assistance prohibited by subsection (a) may be provided to a country described in that subsection if—

(1) the President determines that national security interests or humanitarian reasons justify a waiver of subsection (a), except that humanitarian reasons may not be used to justify assistance under part II of this Act (including chapter 4, chapter 6, and chapter 8), or the Export-Import Bank Act of 1945; and

(2) at least 15 days before the waiver takes effect, the President consults with the Committee on Foreign Affairs of the House of Representatives and the Committee on Foreign Relations of the Senate regarding the proposed waiver and submits a report to the Speaker of the House of Representatives and

the chairman of the Committee on Foreign Relations of the Senate containing—

(A) the name of the recipient country;

(B) a description of the national security interests or humanitarian reasons which require the waiver;

(C) the type and amount of and the justification for the assistance to be provided pursuant to the waiver; and

(D) the period of time during which such waiver will be effective.

The waiver authority granted in this subsection may not be used to provide any assistance under the Foreign Assistance Act of 1961 which is also prohibited by section 40 of the Arms Export Control Act.

APPENDIX AC

IRAQ SANCTIONS ACT ("ISA") OF 1990

PUBLIC LAW 101-513 [H.R. 5114]
NOVEMBER 5, 1990
FOREIGN OPERATIONS, EXPORT FINANCING, AND RELATED PROGRAMS APPROPRIATIONS ACT

101 P.L. 513; 104 Stat. 1979; 1990 Enacted H.R. 5114; 101 Enacted H.R. 5114 SEC. 586.

SHORT TITLE.
Sections 586 through 586J of this Act may be cited as the "Iraq Sanctions Act of 1990".

SEC. 586A. DECLARATIONS REGARDING IRAQ'S INVASION OF KUWAIT.

The Congress—

(1) condemns Iraq's invasion of Kuwait on August 2, 1990;

(2) supports the actions that have been taken by the President in response to that invasion;

(3) calls for the immediate and unconditional withdrawal of Iraqi forces from Kuwait;

(4) supports the efforts of the United Nations Security Council to end this violation of international law and threat to international peace;

(5) supports the imposition and enforcement of multilateral sanctions against Iraq;

(6) calls on United States allies and other countries to support fully the efforts of the United Nations Security Council, and to take other appropriate actions, to bring about an end to Iraq's occupation of Kuwait; and

(7) condemns the brutal occupation of Kuwait by Iraq and its gross violations of internationally recognized human rights in Kuwait, including widespread arrests, torture, summary executions, and mass extrajudicial killings.

SEC. 586B. CONSULTATIONS WITH CONGRESS.

The President shall keep the Congress fully informed, and shall consult with the Congress, with respect to current and anticipated events regarding the international crisis caused by Iraq's invasion of Kuwait, including with respect to United States actions.

SEC. 586C. TRADE EMBARGO AGAINST IRAQ.

(a) CONTINUATION OF EMBARGO—Except as otherwise provided in this section, the President shall continue to impose the trade embargo and other economic sanctions with respect to Iraq and Kuwait that the United States is imposing, in response to Iraq's invasion of Kuwait, pursuant to Executive Orders Numbered 12724 and 12725 (August 9, 1990) and, to the extent they are still in effect, Executive Orders Numbered 12722 and 12723 (August 2, 1990). Notwithstanding any other

provision of law, no funds, credits, guarantees, or insurance appropriated or otherwise made available by this or any other Act for fiscal year 1991 or any fiscal year thereafter shall be used to support or administer any financial or commercial operation of any United States Government department, agency, or other entity, or of any person subject to the jurisdiction of the United states, for the benefit of the Government of Iraq, its agencies or Instrumentalities, or any person working on behalf of the Government of Iraq, contrary to the trade embargo and other economic sanctions imposed in accordance with this section.

(b) HUMANITARIAN ASSISTANCE—To the extent that transactions involving foodstuffs or payments for foodstuffs are exempted "in humanitarian circumstances" from the prohibitions established by the United States pursuant to United Nations Security Council Resolution 661 (1990), those exemptions shall be limited to foodstuffs that are to be provided consistent with United Nations Security Council Resolution 666 (1990) and other relevant Security Council resolutions.

(c) NOTICE TO CONGRESS OF EXCEPTIONS TO AND TERMINATION OF SANCTIONS—

(1) NOTICE OF REGULATIONS—Any regulations issued after the date of enactment of this Act with respect to the economic sanctions imposed with respect to Iraq and Kuwait by the United States under Executive Orders Numbered 12722 and 12723 (August 2, 1990) and Executive Orders Numbered 12724 and 12725 (August 9, 1990) shall be submitted to the Congress before those regulations take effect.

(2) NOTICE OF TERMINATION OF SANCTIONS—The President shall notify the Congress at least 15 days before the termination, in whole or in part, of any sanction imposed with respect to Iraq or Kuwait pursuant to those Executive orders.

(d) RELATION TO OTHER LAWS—

(1) SANCTIONS LEGISLATION—The sanctions that are described in subsection (a) are in addition to, and not in lieu of the sanctions provided for in section 586G of this Act or any other provision of law.

(2) NATIONAL EMERGENCIES AND UNITED NATIONS LEGISLATION—Nothing in this section supersedes any provision of the National Emergencies Act or any authority of the President under the International Emergency Economic Powers Act or section 5(a) of the United Nations Participation Act of 1945.

SEC. 586D. COMPLIANCE WITH UNITED NATIONS SANCTIONS AGAINST IRAQ.

(a) DENIAL OF ASSISTANCE—None of the funds appropriated or otherwise made available pursuant to this Act to carry out the Foreign Assistance Act of 1961 (including title IV of chapter 2 of part I, relating to the Overseas Private Investment Corporation) or the Arms Export Control Act may be used to provide assistance to any country that is not in compliance with the United Nations Security Council sanctions against Iraq unless the President determines and so certifies to the Congress that—

(1) such assistance is in the national interest of the United States;

(2) such assistance will directly benefit the needy people in that country; or

(3) the assistance to be provided will be humanitarian assistance for foreign nationals who have fled Iraq and Kuwait.

(b) IMPORT SANCTIONS—If the President considers that the taking of such action would promote the effectiveness of the economic sanctions of the United Nations and the United States imposed with respect to Iraq, and is consistent with the national interest, the President may prohibit, for such a period of time as he considers appropriate, the importation into the United States of any or all products of any foreign country that has not prohibited—

(1) the importation of products of Iraq into its customs territory, and

(2) the export of its products to Iraq.

SEC. 586E. PENALTIES FOR VIOLATIONS OF EMBARGO.

Notwithstanding section 206 of the International Emergency Economic Powers Act (50 U.S.C. 1705) and section 5(b) of the United Nations Participation Act of 1945 (22 U.S.C. 287c(b))—

(1) a civil penalty of not to exceed $ 250,000 may be imposed on any person who, after the date of enactment of this Act, violates or evades or attempts to violate or evade Executive Order Numbered 12722, 12723, 12724, or 12725 or any license, order, or regulation issued under any such Executive order; and

(2) whoever, after the date of enactment of this Act, willfully violates or evades or attempts to violate or evade Executive Order Numbered 12722, 12723, 12724, or 12725 or any license, order, or regulation issued under any such Executive order—

(A) shall, upon conviction, be fined not more than $1,000,000, if a person other than a natural person; or

(B) if a natural person, shall, upon conviction, be fined not more than $1,000,000, be imprisoned for not more than 12 years, or both. Any officer, director, or agent of any corporation who knowingly participates in a violation, evasion, or attempt described in paragraph (2) may be punished by imposition of the fine or imprisonment (or both) specified in subparagraph (B) of that paragraph.

SEC. 586F. DECLARATIONS REGARDING IRAQ'S LONG-STANDING VIOLATIONS OF INTERNATIONAL LAW.

(a) IRAQ'S VIOLATIONS OF INTERNATIONAL LAW—The Congress determines that—

(1) the Government of Iraq has demonstrated repeated and blatant disregard for its obligations under international law by violating the Charter of the United Nations, the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (done at Geneva, June 17, 1925), as well as other international treaties;

(2) the Government of Iraq is a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social,

and Cultural Rights and is obligated under the Covenants, as well as the Universal Declaration of Human Rights, to respect internationally recognized human rights;

(3) the State Department's Country Reports on Human Rights Practices for 1989 again characterizes Iraq's human rights record as "abysmal";

(4) Amnesty International, Middle East Watch, and other independent human rights organizations have documented extensive, systematic, and continuing human rights abuses by the Government of Iraq, including summary executions, mass political killings, disappearances, widespread use of torture, arbitrary arrests and prolonged detention without trial of thousands of political opponents, forced relocation and deportation, denial of nearly all civil and political rights such as freedom of association, assembly, speech, and the press, and the imprisonment, torture, and execution of children;

(5) since 1987, the Government of Iraq has intensified its severe repression of the Kurdish minority of Iraq, deliberately destroyed more than 3,000 villages and towns in the Kurdish regions, and forcibly expelled more than 500,000 people, thus effectively depopulating the rural areas of Iraqi Kurdistan;

(6) Iraq has blatantly violated international law by initiating use of chemical weapons in the Iran- Iraq war;

(7) Iraq has also violated international law by using chemical weapons against its own Kurdish citizens, resulting in tens of thousands of deaths and more than 65,000 refugees;

(8) Iraq continues to expand its chemical weapons capability, and President Saddam Hussein has threatened to use chemical weapons against other nations;

(9) persuasive evidence exists that Iraq is developing biological weapons in violation of international law;

(10) there are strong indications that Iraq has taken steps to produce nuclear weapons and has attempted to smuggle from the United States, in violation of United States law, components for triggering devices used in nuclear warheads whose manufacture would contravene the Treaty on the Non-Proliferation of Nuclear Weapons, to which Iraq is a party; and

(11) Iraqi President Saddam Hussein has threatened to use terrorism against other nations in violation of international law and has increased Iraq's support for the Palestine Liberation Organization and other Palestinian groups that have conducted terrorist acts.

(b) HUMAN RIGHTS VIOLATIONS—The Congress determines that the Government of Iraq is engaged in a consistent pattern of gross violations of internationally recognized human rights. All provisions of law that impose sanctions against a country whose government is engaged in a consistent pattern of gross violations of internationally recognized human rights shall be fully enforced against Iraq.

(c) SUPPORT FOR INTERNATIONAL TERRORISM. —

(1) The Congress determines that Iraq is a country which has repeatedly provided support for acts of international terrorism, a country which grants sanctuary from prosecution to individuals or groups which have committed an act of international terrorism, and a country which otherwise supports international terrorism. The provisions of law specified in paragraph (2) and all other provisions of law that impose sanctions against a country which has repeatedly provided support for acts of international terrorism, which grants sanctuary from prosecution to an individual or group which has committed an act of International terrorism, or which otherwise supports international terrorism shall be fully enforced against Iraq.

(2) The provisions of law referred to in paragraph (1) are—

(A) section 40 of the Arms Export Control Act;

(B) section 620A of the Foreign Assistance Act of 1961;

(C) sections 555 and 556 of this Act (and the corresponding sections of predecessor foreign operations appropriations Acts); and

(D) section 555 of the International Security and Development Cooperation Act of 1985.

(d) MULTILATERAL COOPERATION—The Congress calls on the President to seek multilateral cooperation—

(1) to deny dangerous technologies to Iraq;

(2) to induce Iraq to respect internationally recognized human rights; and

(3) to induce Iraq to allow appropriate international humanitarian and human rights organizations to have access to Iraq and Kuwait, including the areas in northern Iraq traditionally inhabited by Kurds.

SEC. 586G. SANCTIONS AGAINST IRAQ.

(a) IMPOSITION—Except as provided in section 586H, the following sanctions shall apply with respect to Iraq:

(1) FMS SALES—The United States Government shall not enter into any sale with Iraq under the Arms Export Control Act.

(2) COMMERCIAL ARMS SALES—Licenses shall not be issued for the export to Iraq of any item on the United States Munitions List.

(3) EXPORTS OF CERTAIN GOODS AND TECHNOLOGY—The authorities of section 6 of the Export Administration Act of 1979 (50 U.S.C. App. 2405) shall be used to prohibit the export to Iraq of any goods or technology listed pursuant to that section or section 5(c)(1) of that Act (50 U.S.C. App. 2404(c)(1)) on the control list provided for in section 4(b) of that Act (50 U.S.C. App. 2403(b)).

(4) NUCLEAR EQUIPMENT, MATERIALS, AND TECHNOLOGY—

(A) NRC LICENSES—The Nuclear Regulatory Commission shall not issue any license or other authorization under the Atomic Energy Act of 1954 (42 U.S.C. 2011 and following) for the export to Iraq of any source or special nuclear material, any production or utilization facility, any sensitive nuclear technology, any component, item, or substance determined to have

significance for nuclear explosive purposes pursuant to section 109b. of the Atomic Energy Act of 1954 (42 U.S.C. 2139(b)), or any other material or technology requiring such a license or authorization.

(B) DISTRIBUTION OF NUCLEAR MATERIALS—The authority of the Atomic Energy Act of 1954 shall not be used to distribute any special nuclear material, source material, or byproduct material to Iraq.

(C) DOE AUTHORIZATIONS—The Secretary of Energy shall not provide a specific authorization under section 57b. (2) of the Atomic Energy Act of 1954 (42 U.S.C. 2077(b)(2)) for any activity that would constitute directly or indirectly engaging in Iraq in activities that require a specific authorization under that section.

(5) ASSISTANCE FROM INTERNATIONAL FINANCIAL INSTITUTIONS—The United States shall oppose any loan or financial or technical assistance to Iraq by international financial institutions in accordance with section 701 of the International Financial Institutions Act (22 U.S.C. 262d).

(6) ASSISTANCE THROUGH THE EXPORT-IMPORT BANK—Credits and credit guarantees through the Export-Import Bank of the United States shall be denied to Iraq.

(7) ASSISTANCE THROUGH THE COMMODITY CREDIT CORPORATION—Credit, credit guarantees, and other assistance through the Commodity Credit Corporation shall be denied to Iraq.

(8) FOREIGN ASSISTANCE—All forms of assistance under the Foreign Assistance Act of 1961 (22 U.S.C. 2151 and following) other than emergency assistance for medical supplies and other forms of emergency humanitarian assistance, and under the Arms Export Control Act (22 U.S.C. 2751 and following) shall be denied to Iraq.

(b) CONTRACT SANCTITY—For purposes of the export controls imposed pursuant to subsection (a)(3), the date described in subsection (m)(1) of section 6 of the Export Administration Act of 1979 (50 U.S.C. App. 2405) shall be deemed to be August 1, 1990.

SEC. 586H. WAIVER AUTHORITY.

(a) IN GENERAL—The President may waive the requirements of any paragraph of section 586G(a) if the President makes a certification under subsection (b) or subsection (c).

(b) CERTIFICATION OF FUNDAMENTAL CHANGES IN IRAQI POLICIES AND ACTIONS—The authority of subsection (a) may be exercised 60 days after the President certifies to the Congress that—

(1) the Government of Iraq—

(A) has demonstrated, through a pattern of conduct, substantial improvement in its respect for internationally recognized human rights;

(B) is not acquiring, developing, or manufacturing (i) ballistic missiles, (ii) chemical, biological, or nuclear weapons, or (iii) components for such weapons; has forsworn the first use of

such weapons; and is taking substantial and verifiable steps to destroy or otherwise dispose of any such missiles and weapons it possesses; and

(C) does not provide support for international terrorism;

(2) the Government of Iraq is in substantial compliance with its obligations under international law, including—

(A) the Charter of the United Nations;

(B) the International Covenant on Civil and Political Rights (done at New York, December 16, 1966) and the International Covenant on Economic, Social, and Cultural Rights (done at New York, December 16, 1966);

(C) the Convention on the Prevention and Punishment of the Crime of Genocide (done at Paris, December 9, 1948);

(D) the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (done at Geneva, June 17, 1925);

(E) the Treaty on the Non-Proliferation of Nuclear Weapons (done at Washington, London, and Moscow, July 1, 1968); and

(F) the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (done at Washington, London, and Moscow, April 10, 1972); and

(3) the President has determined that it is essential to the national interests of the United States to exercise the authority of subsection (a).

(c) CERTIFICATION OF FUNDAMENTAL CHANGES IN IRAQI LEADERSHIP AND POLICIES—The authority of subsection (a) may be exercised 30 days after the President certifies to the Congress that—

(1) there has been a fundamental change in the leadership of the Government of Iraq; and

(2) the new Government of Iraq has provided reliable and credible assurance that—

(A) it respects internationally recognized human rights and it will demonstrate such respect through its conduct;

(B) it is not acquiring, developing, or manufacturing and it will not acquire, develop, or manufacture (i) ballistic missiles, (ii) chemical, biological, or nuclear weapons, or (iii) components for such weapons; has forsworn the first use of such weapons; and is taking substantial and verifiable steps to destroy or otherwise dispose of any such missiles and weapons it possesses;

(C) it is not and will not provide support for international terrorism; and

(D) it is and will continue to be in substantial compliance with its obligations under international law, including all the treaties specified in subparagraphs (A) through (F) of subsection (b)(2).

(d) INFORMATION TO BE INCLUDED IN CERTIFICATIONS—Any certification under subsection (b) or (c) shall include the justification for each determination required by that subsection. The certification shall also specify which paragraphs of

section 586G(a) the President will waive pursuant to that certification.

SEC. 586I. DENIAL OF LICENSES FOR CERTAIN EXPORTS TO COUNTRIES ASSISTING IRAQ'S ROCKET OR CHEMICAL, BIOLOGICAL, OR NUCLEAR WEAPONS CAPABILITY.

(a) RESTRICTION ON EXPORT LICENSES—None of the funds appropriated by this or any other Act may be used to approve the licensing for export of any supercomputer to any country whose government the President determines is assisting, or whose government officials the President determines are assisting, Iraq to improve its rocket technology or chemical, biological, or nuclear weapons capability.

(b) NEGOTIATIONS—The President is directed to begin immediate negotiations with those governments with which the United States has bilateral supercomputer agreements, including the Government of the United Kingdom and the Government of Japan, on conditions restricting the transfer to Iraq of supercomputer or associated technology.

SEC. 586J. REPORTS TO CONGRESS.

(a) STUDY AND REPORT ON THE INTERNATIONAL EXPORT TO IRAQ OF NUCLEAR, BIOLOGICAL, CHEMICAL, AND BALLISTIC MISSILE TECHNOLOGY—

(1) The President shall conduct a study on the sale, export, and third party transfer or development of

nuclear, biological, chemical, and ballistic missile technology to or with Iraq including—

(A) an identification of specific countries, as well as companies and individuals, both foreign and domestic, engaged in such sale or export of, nuclear, biological, chemical, and ballistic missile technology;

(B) a detailed description and analysis of the international supply, information, support, and coproduction network, individual, corporate, and state, responsible for Iraq's current capability in the area of nuclear, biological, chemical, and ballistic missile technology; and

(C) a recommendation of standards and procedures against which to measure and verify a decision of the Government of Iraq to terminate the development, production, coproduction, and deployment of nuclear, biological, chemical, and offensive ballistic missile technology as well as the destruction of all existing facilities associated with such technologies.

(2) The President shall include in the study required by paragraph (1) specific recommendations on new mechanisms, to include, but not be limited to, legal, political, economic and regulatory, whereby the United States might contribute, in conjunction with its friends, allies, and the international community, to the management, control, or elimination of the threat of nuclear, biological, chemical, and ballistic missile proliferation.

(3) Not later than March 30, 1991, the President shall submit to the Committee on Appropriations and the Committee on Foreign Relations of the Senate and the Committee on Appropriations and

the Committee on Foreign Affairs of the House of Representatives, a report, in both classified and unclassified form, setting forth the findings of the study required by paragraph (1) of this subsection.

(b) STUDY AND REPORT ON IRAQ'S OFFENSIVE MILITARY CAPABILITY—

(1) The President shall conduct a study on Iraq's offensive military capability and its effect on the Middle East balance of power including an assessment of Iraq's power projection capability, the prospects for another sustained conflict with Iran, joint Iraqi-Jordanian military cooperation, the threat Iraq's arms transfer activities pose to United States allies in the Middle East, and the extension of Iraq's political-military influence into Africa and Latin America.

(2) Not later than March 30, 1991, the President shall submit to the Committee on Appropriations and the Committee on Foreign Relations of the Senate and the Committee on Appropriations and the Committee on Foreign Affairs of the House of Representatives, a report, in both classified and unclassified form, setting forth the findings of the study required by paragraph (1).

(c) REPORT ON SANCTIONS TAKEN BY OTHER NATIONS AGAINST IRAQ—

(1) The President shall prepare a report on the steps taken by other nations, both before and after the August 2, 1990, invasion of Kuwait, to curtail the export of goods, services, and technologies to Iraq which might contribute to, or enhance, Iraq's nuclear, biological, chemical, and ballistic missile capability.

(2) The President shall provide a complete accounting of international compliance with each of

the sanctions resolutions adopted by the United Nations Security Council against Iraq since August 2, 1990, and shall list, by name, each country which to his knowledge, has provided any assistance to Iraq and the amount and type of that assistance in violation of each United Nations resolution.

(3) The President shall make every effort to encourage other nations, in whatever forum or context, to adopt sanctions toward Iraq similar to those contained in this section.

(4) Not later than every 6 months after the date of enactment of this Act, the President shall submit to the Committee on Appropriations and the Committee on Foreign Relations of the Senate and the Committee on Appropriations and the Committee on Foreign Affairs of the House of Representatives, a report in both classified and unclassified form, setting forth the findings of the study required by paragraph (1) of this subsection.

APPENDIX AD

28 U.S.C. § 1605(a)(7) (repealed 2008)

Sec. 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

* * * * *

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS)

in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if—

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

APPENDIX AE

National Defense Authorization Act for the Fiscal Year 2008, Pub. L. 110-181, § 1083, 122 Stat. 338 (2008)

SEC. 1083. TERRORISM EXCEPTION TO IMMUNITY.

(a) TERRORISM EXCEPTION TO IMMUNITY—

(1) IN GENERAL—Chapter 97 of title 28, United States Code, is amended by inserting after section 1605 the following:

"§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

"(a) IN GENERAL—

"(1) NO IMMUNITY—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

"(2) CLAIM HEARD—The court shall hear a claim under this section if—

"(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

"(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

"(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

"(I) a national of the United States;

"(II) a member of the armed forces; or

"(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

"(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable

opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

"(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

"(b) LIMITATIONS—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

"(1) 10 years after April 24, 1996; or

"(2) 10 years after the date on which the cause of action arose.

"(c) PRIVATE RIGHT OF ACTION—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

"(1) a national of the United States,

"(2) a member of the armed forces,

"(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

"(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

"(d) ADDITIONAL DAMAGES—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

"(e) SPECIAL MASTERS—

"(1) IN GENERAL—The courts of the United States may appoint special masters to hear damage claims brought under this section.

"(2) TRANSFER OF FUNDS—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

"(f) APPEAL—In an action brought under this section, appeals from orders not conclusively ending the

litigation may only be taken pursuant to section 1292(b) of this title.

"(g) PROPERTY DISPOSITION.-

(1) IN GENERAL—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

"(A) subject to attachment in aid of execution, or execution, under section 1610;

"(B) located within that judicial district; and

"(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

"(2) NOTICE—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

"(3) ENFORCEABILITY—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

"(h) DEFINITIONS—For purposes of this section—

"(1) the term 'aircraft sabotage' has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

"(2) the term 'hostage taking' has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

"(3) the term 'material support or resources' has the meaning given that term in section 2339A of title 18;

"(4) the term 'armed forces' has the meaning given that term in section 101 of title 10;

"(5) the term 'national of the United States' has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

"(6) the term 'state sponsor of terrorism' means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

"(7) the terms 'torture' and 'extrajudicial killing' have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).".

(2) AMENDMENT TO CHAPTER ANALYSIS.- The table of sections at the beginning of chapter 97 of title 28, United States Code, is amended by inserting after the item relating to section 1605 the following:

"1605A. Terrorism exception to the jurisdictional immunity of a foreign state.".

(b) CONFORMING AMENDMENTS—

(1) GENERAL EXCEPTION—Section 1605 of title 28, United States Code, is amended—

(A) in subsection (a)—

(i) in paragraph (5)(B), by inserting "or" after the semicolon;

(ii) in paragraph (6)(D), by striking "; or" and inserting a period; and

(iii) by striking paragraph (7);

(B) by repealing subsections (e) and (f); and

(C) in subsection (g)(1)(A), by striking "but for subsection (a)(7)" and inserting "but for section 1605A".

(2) COUNTERCLAIMS.- Section 1607(a) of title 28, United States Code, is amended by inserting "or 1605A" after "1605".

(3) PROPERTY.- Section 1610 of title 28, United States Code, is amended—

(A) in subsection (a)(7), by striking "1605(a)(7)" and inserting "1605A";

(B) in subsection (b)(2), by striking "(5), or (7), or 1605(b)" and inserting "or (5), 1605(b), or 1605A";

(C) in subsection (f), in paragraphs (1)(A) and (2)(A), by inserting "(as in effect before the enactment of section 1605A) or section 1605A" after "1605(a)(7)"; and

(D) by adding at the end the following:

"(g) PROPERTY IN CERTAIN ACTIONS—

"(1) IN GENERAL—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

"(A) the level of economic control over the property by the government of the foreign state;

"(B) whether the profits of the property go to that government;

"(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

"(D) whether that government is the sole beneficiary in interest of the property; or

"(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

"(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

"(3) THIRD-PARTY JOINT PROPERTY HOLDERS—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.".

(4) VICTIMS OF CRIME ACT—Section 1404C(a)(3) of the Victims of Crime Act of 1984 (42 U.S.C. 10603c(a)(3)) is amended by striking "December 21, 1988 with respect to which an investigation or" and inserting "October 23, 1983, with respect to which an investigation or civil or criminal".

(c) APPLICATION TO PENDING CASES—

(1) IN GENERAL—The amendments made by this section shall apply to any claim arising under section 1605A of title 28, United States Code.

(2) PRIOR ACTIONS—

(A) IN GENERAL—With respect to any action that—

(i) was brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), before the date of the enactment of this Act,

(ii) relied upon either such provision as creating a cause of action,

(iii) has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action against the state, and

(iv) as of such date of enactment, is before the courts in any form, including on appeal or motion under rule 60(b) of the Federal Rules of Civil Procedure,

that action, and any judgment in the action shall, on motion made by plaintiffs to the United States district court where the action was initially brought, or judgment in the action was initially entered, be given effect as if the action had originally been filed under section 1605A(c) of title 28, United States Code.

(B) DEFENSES WAIVED—The defenses of res judicata, collateral estoppel, and limitation period are waived-

(i) in any action with respect to which a motion is made under subparagraph (A), or

(ii) in any action that was originally brought, before the date of the enactment of this Act, under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), and is refiled under section 1605A(c) of title 28, United States Code, to the extent such defenses are based on the claim in the action.

(C) TIME LIMITATIONS—A motion may be made or an action may be refiled under subparagraph (A) only—

(i) if the original action was commenced not later than the latter of—

(I) 10 years after April 24, 1996; or

(II) 10 years after the cause of action arose; and

(ii) within the 60-day period beginning on the date of the enactment of this Act.

(3) RELATED ACTIONS—If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), any other action arising out of the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after—

(A) the date of the entry of judgment in the original action; or

(B) the date of the enactment of this Act.

(4) PRESERVING THE JURISDICTION OF THE COURTS—Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

(d) APPLICABILITY TO IRAQ—

(1) APPLICABILITY—The President may waive any provision of this section with respect to Iraq, insofar as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof, if the President determines that—

(A) the waiver is in the national security interest of the United States;

(B) the waiver will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq; and

(C) Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.

(2) TEMPORAL SCOPE—The authority under paragraph (1) shall apply—

(A) with respect to any conduct or event occurring before or on the date of the enactment of this Act;

(B) with respect to any conduct or event occurring before or on the date of the exercise of that authority; and

(C) regardless of whether, or the extent to which, the exercise of that authority affects any action filed before, on, or after the date of the exercise of that authority or of the enactment of this Act.

(3) NOTIFICATION TO CONGRESS—A waiver by the President under paragraph (1) shall cease to be effective 30 days after it is made unless the President has notified Congress in writing of the basis for the waiver as determined by the President under paragraph (1).

(4) SENSE OF CONGRESS—It is the sense of the Congress that the President, acting through the Secretary of State, should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime against individuals who were United States nationals or members of the United States Armed Forces at the time of those terrorist acts and whose claims cannot be addressed in courts in the United

States due to the exercise of the waiver authority under paragraph (1).

(e) SEVERABILITY—If any provision of this section or the amendments made by this section, or the application of such provision to any person or circumstance, is held invalid, the remainder of this section and such amendments, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.

APPENDIX AF

David DALIBERTI, et al., Plaintiffs,
v.
REPUBLIC OF IRAQ, Defendant.
No. CIV. A. 96-1118 (LFO).

United States District Court,
District of Columbia
May 25, 2001.

MEMORANDUM OPINION

OBERDORFER, District Judge.

Four male United States citizens and their spouses brought suit against the Republic of Iraq for injuries stemming from alleged acts of torture and hostage taking. Jurisdiction arises under 28 U.S.C. § 1605(a)(7). The defendant filed a motion to dismiss, which was denied by Judge Paul Friedman's Order of May 23, 2000. *Daliberti v. Republic of Iraq*, 97 F.Supp.2d 38 (D.D.C. 2000). Following the denial, defendant's counsel withdrew from the case, and the Clerk of Court entered a default against the defendant on October 16, 2000.

On November 9, 2000, plaintiffs moved for a default judgment. During a four-day ex parte bench trial, plaintiffs presented evidence to justify their judgment.[1] Plaintiffs testified in detail under oath in

[1] The plaintiffs and the Court made significant efforts to ensure proper notice to defendant of all proceedings. The

open court in response to questions from counsel and the Court. Based on the credible and necessarily uncontroverted material evidence presented at trial, judgment shall be entered for the plaintiffs.

I.

Following the conclusion of hostilities between the United States and the Republic of Iraq in 1991, the four male plaintiffs resided in Kuwait, working in various civilian capacities in and around the Kuwait-Iraqi border. Clinton Hall worked clearing the desert of mines and munitions from the Kuwait side of the demilitarized zone. Kenneth Beaty was an oil rig drilling supervisor. David Daliberti and William Barloon worked together, for different employers, maintaining and overhauling aircraft in Kuwait. Although some of the plaintiffs had military experience prior to living in Kuwait, they lived and worked in Kuwait as civilians. Beginning in 1992, in separate incidents, each male plaintiff was taken into custody by Iraq government employees, and held captive in Iraq. Clinton Hall was held in Iraq for five days. David Daliberti and William Barloon, taken

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plaintiffs sent their pretrial brief to the Iraqi Interests Section, care of the Embassy of Algeria; it was returned stamped "refused." Pls.' Ex. 26. The Clerk of Court also effected diplomatic service, via the United States Department of State, of orders and memoranda generated by the Court. *See Daliberti v. Republic of Iraq*, Civ. No. 96-1118 (docket entry of March 2, 2001); Tr. 271-73. Defendant was given every possible opportunity to participate meaningfully in the trial. In the absence of defense counsel, the Court used particular care to draw the following findings of fact and conclusions of law from admissible testimony in accordance with the Federal Rules of Evidence.

and imprisoned together, were held for 126 days. Kenneth Beaty was held the longest, for 205 days.

At trial, each of the former prisoners testified in detail about the conditions of their capture and confinement and the physical and psychological effect of their experience on them. Plaintiffs also presented two expert witnesses, by video deposition, to support their claims for damages. Dr. William Reid, a psychiatrist, testified that each plaintiff suffered palpable psychological damage stemming from the events related by the plaintiffs. Dr. Reid is currently a professor of psychiatry at the University of Texas Health Science Center and has authored numerous articles and books, including an article dealing specifically with victims of terrorism and hostage situations. Pls.' Ex. 4. Dr. Reid's academic background and experience, particularly his significant experience in evaluating and treating former hostages, qualify him to offer expert testimony as to the plaintiffs' mental and emotional injuries. Dr. Barry Wilbratte testified to the economic impact of the captivity on plaintiffs, specifically, their loss of past and future wages. Dr. Wilbratte holds a Ph.D. in economics from Tulane University and is the Chair of the Department of Economics at the University of St. Thomas. Pls.' Ex. 5. In federal and state courts, Dr. Wilbratte has testified about litigants' wage loss. His education and experience qualify him to testify as an expert in this case. Dr. Wilbratte considered the difference between plaintiffs' earnings from employment overseas at the time of their seizure and their diminished earnings from employment in the United States, taking into account various economic factors.

II.

Clinton Hall

On the morning of October 6, 1992, Clinton Hall was supervising his crew south of the Iraqi-Kuwait border. Hall and his crew were working inside Kuwaiti territory, the border having been clearly marked with concrete markers and steel rods with flags. Hall noticed an Iraqi patrol nearing his crew, and approached them, with a United Nations officer, to inform them that they were inside the Kuwait border. The Iraqi guards insisted that Hall was inside the Iraqi border and took him into custody at gunpoint, driving him first to Basra and then to Baghdad. Tr. 101-112. The Iraqis released Hall after five days in captivity. Tr. 150.

During Hall's confinement, he lived in a small prison cell with no lights, window, water, or toilet. He was frequently denied food and water, and had only limited access to any toilet facilities. Tr. 129. Iraqi guards or officers interrogated him, in the process accusing him of espionage. At times they threatened him with physical torture, such as cutting off his fingers, pulling out his fingernails, or shocking him electrically in his testicles. He was in constant fear that he would be killed or suffer serious bodily harm. Tr. 119-122.

Kenneth Beaty

On April 25, 1993, Kenneth Beaty was traveling in Kuwait, on his way to an oil rig owned by his employer, which was located within sight of the Iraqi-Kuwait border. He stopped at an Iraqi border checkpoint and displayed his credentials to the Iraqi border guards. The guards detained him at gunpoint

and then drove him to Basra, Iraq, and later to Baghdad. While he was being transported, he was often blindfolded and held at gunpoint. Tr. 22-25.

In Baghdad, he was initially confined in a car park, converted into a prison, in a cell that had no water or toilet, and only a steel cot for a bed. Tr. 28, 32-33. After 11 days, Beaty stood trial in Iraq for espionage, and although the Iraqi court found him not guilty of espionage, it later found him guilty of illegal entry into Iraq. Beaty was sentenced to 7 or 8 years in prison, and transferred to Abu Ghreib prison in Baghdad. Tr. 36-41. There, he lived in a cell infested with vermin and shared a toilet with more than 200 other prisoners. He suffered from a heart condition but was denied adequate medical attention and medication while in prison. Tr. 44-51.

While Beaty was incarcerated, his wife, Robin, undertook to secure his release. To that end, she spoke with Iraqi officials, including the Iraqi Ambassador to the United Nations Nizar Hamdoon, and with United Nations Secretary General Boutros Boutros-Ghali. Her conversations with them established that Iraq sought either a lifting of the economic sanctions imposed by the United States or a significant humanitarian gift in exchange for her husband's release. Tr. 82-87. She succeeded in raising $5,000,000 worth of prescription medicine, water purification equipment, and other medical goods, all exempt from the sanctions or embargo, to be delivered to Iraq. Tr. 87-88. She also persuaded prominent American citizens, including former President Jimmy Carter, to write letters to Iraqi officials in support of Beaty's release. Pls.' Ex. 1.

Another prominent supporter, Senator David Boren of Oklahoma, contacted Ambassador Hamdoon

to open a dialogue regarding Beaty's release. The Senator's conversations with Iraqi officials confirmed that Iraq was holding Beaty in order to exact a price for his release, either in the form of humanitarian aid or the lifting of sanctions. Deposition of Senator David Boren ("Boren Tr."), March 17, 1997, 12-13 (Pls.' Ex. 7-F). Ambassador Hamdoon eventually informed the Senator that if he traveled to Baghdad personally, Iraq would release Beaty into his custody. Boren Tr. 15. Robin Beaty delivered the medical package she had assembled. Senator Boren himself traveled to Baghdad to support her efforts. On November 14, 1993, 205 days after Iraq initially detained Beaty, Iraq released him into Senator Boren's custody. Tr. 66-67.

David Daliberti and William Barloon

On March 13, 1995, David Daliberti and William Barloon were traveling in Kuwait when they mistakenly ventured across the border into Iraq. Iraqi guards seized them at gunpoint, despite the presence and protests of United Nations officials, and took them to Basra, Iraq. Tr. 179-181. The United Nations report on the incident, although it faulted the plaintiffs' judgment, nonetheless determined that the conduct of the Iraqi guards was unacceptable. United Nations Border Crossing Incident Report, June 14, 1995 (Pls.' Ex. 21). Daliberti and Barloon were taken to Baghdad, where, on trial for illegal entry into the country, an Iraqi court convicted them of that offense and sentenced each of them to 8 years in prison. They were transferred to Abu Ghreib prison in Baghdad. Tr. 197-200.

During their captivity, both initially and after they were sentenced, Daliberti and Barloon were in constant fear for their lives. They observed that their captors displayed little respect for human life. At one point, an Iraqi guard attempted to execute Barloon, but was stopped by another guard. In another incident, the vehicle transporting Daliberti struck a pedestrian at high speed, yet failed to stop. Tr. 185-188. They frequently heard other prisoners being beaten, and feared being beaten themselves. Tr. 192, 198. They suffered at times from serious medical problems while in prison, but were never promptly or adequately treated. Tr. 191-204. On a visit to the prison, Kathy Daliberti and Linda Barloon observed that their husbands had lost weight and appeared to be hopeless and despondent. Tr. 206-207, 219-220, 287-290. Like the other plaintiffs, Daliberti and Barloon were not given sufficient food, water or access to toilet facilities. Tr. 191.

During their confinement, then Congressman William Richardson entered into discussions with Ambassador Hamdoon to obtain their release. Deposition of William Richardson ("Richardson Tr."), June 26, 2000 (Pls.' Ex. 7G-2). Congressman Richardson concluded, as in the case of Kenneth Beaty, that the Iraqi government was holding Daliberti and Barloon as leverage to exact concessions from the United States government, or to obtain humanitarian aid. Congressman Richardson traveled to Iraq to meet with Ambassador Hamdoon and Saddam Hussein, who confirmed that Iraq sought tangible benefits, such as aid or the easing of sanctions, in exchange for plaintiffs' release. Richardson Tr. 11-14. Ultimately, although there is no evidence that the United States provided any

such relief, Iraq released Daliberti and Barloon into the custody of Congressman Richardson, after holding them for a total of 126 days.

III.

Although the plaintiffs were taken and held in separate incidents and for varying lengths of time, each has suffered remarkably similar effects. Hall, Beaty, Daliberti and Barloon have each been diagnosed with post traumatic stress disorder. Following their release, they exhibited marked changes in personality, such as anger, feelings of detachment and isolation, nightmares, and insomnia. Each plaintiff has suffered significant damage to his marriage and has ongoing problems with intimacy and personal relationships. According to the testimony of Dr. Reid, these men will experience these effects for the rest of their lives.[2]

Because of their psychological damage, none of the male plaintiffs was able to continue working overseas. Although some of the plaintiffs attempted more aggressively than others to return to overseas work, each plaintiff eventually returned to the United States. Tr. 69-70, 150-153, 213-214, 277-280. Feelings of isolation and fear prevented any of them from maintaining their more lucrative overseas positions, and each has suffered financial loss because of the inability and unwillingness to do so. Dr. Wilbratte's testimony established that the male

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[2] Dr. Reid testified to these conclusions in specific detail about each plaintiff. Deposition of Dr. William Reid ("Reid Tr."), March 16, 2001. He also prepared individual reports for each male plaintiff which detail his findings. Pls.' Exs. 17a, c-e.

plaintiffs' past and future wage loss (reduced to present value) is as follows:

Plaintiff	Past wage loss	Future wage loss
Clinton Hall	$1,037,897	$ 709,107
Kenneth Beaty	$ 723,326	$1,462,115
William Barloon	$ 526,323	$1,155,962
David Daliberti	$ 710,104	$1,878,455

Deposition of Barry Wilbratte, Ph.D., February 21, 2001; *see also* Plaintiffs' Pretrial Brief & Attached Exhibits.

The testimony of the spouse plaintiffs, supported by Dr. Reid's expert opinion, demonstrated that they have also suffered since their husbands' seizure. The psychological damage to the husbands, in each case, caused an immediate and severe deterioration of the marital relationship. The wives testified that before their husbands' capture they had been in satisfactory marriages that gave them love, companionship, and support; after their husbands returned, their marriages became strained and distant. Tr. 89-90, 163-169, 214-223, 281-295. The Halls have divorced, and the Barloons are separated. Kenneth Beaty testified that, although he and his wife are still together, they are more "like roommates" than spouses. The Dalibertis' marriage has suffered similar effects.

IV.

The foregoing findings of fact lead to the following conclusions of law. The Foreign Sovereign Immunities Act (FSIA) exempts from immunity foreign sovereigns where "money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources ... for such an act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency ...." 28 U.S.C. § 1605(a)(7).

The FSIA adopts the definitions of hostage taking and torture used in the International Convention Against the Taking of Hostages, and the Torture Victim Protection Act of 1991, respectively. *Id.* § 1605(e). Torture is defined as

> any act, directed against an individual in the offender's custody, by which severe pain or suffering (other than pain and suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.

Section 3(b)(1), Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 Note. Hostage taking is defined as follows:

> Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages within the meaning of this Convention.

34 U.N. GAOR Supp. No. 46, at 245 (TIAS 11081). The Secretary of State of the United States designated defendant Republic of Iraq as a state sponsor of terrorism pursuant to Section 6(j) of the Export Administration Act of 1979 on September 13, 1990. 55 Fed. Reg. 37793-01.

The FSIA, as amended, provides liability for "money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7)." Pub. L. 104-208, Div A, Title I § 101(c) [Title V, § 589], 110 Stat. 3009-172, codified at 28 U.S.C. § 1605 note.

The treatment of Clinton Hall by employees or agents of defendant, as detailed above, including holding him at gunpoint, threatening to injure him physically if he did not confess to espionage or otherwise provide information, and incarcerating him in a room with no bed, window, light, electricity,

water, toilet or adequate access to sanitary facilities, constituted torture as defined by the FSIA. The defendant likewise tortured Kenneth Beaty, David Daliberti and William Barloon, as detailed in the foregoing findings, by committing acts such as placing loaded guns to their heads, depriving them of medical treatment, and incarcerating them in an environment without adequate toilet facilities. Defendant also detained plaintiffs Kenneth Beaty, David Daliberti, and William Barloon in an attempt to condition their release on the receipt of humanitarian aid and/or the lifting of sanctions or the United Nations embargo. In doing so, defendant committed the FSIA offense of hostage taking. The FSIA entitles plaintiffs Clinton Hall, Kenneth Beaty, David Daliberti and William Barloon to compensation for their mental and physical suffering—during their incarceration, since their release, and in the future—and for their wage loss and other damages. Similarly, plaintiffs Elizabeth Hall, Robin Beaty, Kathy Daliberti, and Linda Barloon, are entitled to compensation for the damages, including loss of solatium and pain and suffering, that they suffered as a result of the actions of the defendant.

Plaintiffs seeks damages in excess of $100,000,000. These include past and future wage loss for the male plaintiffs, $10,000 per day for each day they were incarcerated, and damages for past and future pain and suffering, calculated on a per day basis according to each plaintiff's life expectancy. In addition, each spouse plaintiff seeks $10,000,000 for solatium. In reaching an appropriate damages award, earlier decisions awarding damages under the FSIA against foreign sovereigns for torture and

hostage taking served as a benchmark. The Court considered the amounts awarded in those cases in light of the similarities and differences in the facts of each case. Beginning in 1985, Terry Anderson, David Jacobsen, Joseph Cicippio, and Frank Reed were held hostage in Iran. They were awarded, approximately, $10,000 per day for each day they were incarcerated, in addition to any lost wages they suffered. *Cicippio v. Islamic Republic of Iran,* 18 F.Supp.2d 62 (D.D.C. 1998); *Anderson v. Islamic Republic of Iran,* 90 F. Supp. 2d 107 (D.D.C. 2000). The *Anderson* and *Cicippio* cases represent the most extreme examples of torture and inhumane incarceration, where the daily conditions to which the prisoners were subjected make their survival remarkable. The experiences of the male plaintiffs here, while brutal and life-changing, were not so severe. The contrast considered, the amount awarded to the *Anderson* and *Cicippio* plaintiffs, $10,000 per day of incarceration, is reasonable and appropriate in this case. This amount alone, without a separate award for pain and suffering, is sufficient to compensate the male plaintiffs for both the suffering inflicted by the captivity itself, and for the psychological injuries experienced by them following their release. The following sets forth the time spent in incarceration and the compensation to which of them is entitled.

Kenneth Beaty	205 days in prison	$2,050,000.00
Clinton Hall	5 days in prison	$ 50,000.00
David Daliberti	126 days in prison	$1,260,000.00
William Barloon	126 days in prison	$1,260,000.00

Plaintiffs Clinton Hall, Kenneth Beaty, David Daliberti and William Barloon also deserve compensation for their loss of wages to date and the present value of their projected future wage loss, as calculated by Dr. Wilbratte and set forth above, including appropriate assumptions as to inflation, rise in productivity, job advancement, personal consumption and net earnings. *See Flatow v. Islamic Republic of Iran,* 999 F. Supp. 1, 27 (D.D.C. 1998). The Court has considered the duty of plaintiffs to mitigate their damages. Each plaintiff suffered psychological damage that made it difficult, if not impossible, to continue in the same type of overseas work that he had engaged in prior to his incarceration. The plaintiffs presented expert psychiatric testimony to support a conclusion that they have each made reasonable efforts to mitigate their damages to the extent possible, and that their failure to earn wages at previous levels is consistent with their psychological injuries.

The spouse plaintiffs are entitled to an award of damages for loss of the society and companionship of their husbands as a result of defendant's actions. Again, the *Anderson* and *Cicippio* cases serve as useful guidance; each spouse was awarded $10,000,000 for solatium. In those cases, the spouses lived for years while their husbands were in captivity, "never knowing if their husbands were being tortured or were even still alive." *Cicippio,* 18 F.Supp.2d at 70. In the case of Terry Anderson's wife, she gave birth to their daughter and raised her for approximately six years without her husband. *Anderson,* 90 F. Supp. 2d at 111. Taking into account the length of time that the spouse plaintiffs were without the companionship and support of their

husbands during their captivity, the degree of severity of their husbands' treatment, and the damage to their marriages and the suffering they have experienced since their husbands were released, Robin Beaty, Elizabeth Hall, Kathy Daliberti and Linda Barloon will each be awarded damages in the amount of $1,500,000.

To summarize, the total compensatory damages awards for all plaintiffs are as follows:

Kenneth Beaty:	$4,235,441
Robin Beaty	$1,500,000
Clinton Hall	$1,797,004
Elizabeth Hall	$1,500,000
William Barloon	$2,942,285
Linda Barloon	$1,500,000
David Daliberti	$3,848,559
Kathy Daliberti	$1,500,000

. . . . . .

An accompanying Order implements the decisions announced herein.

ORDER AND JUDGMENT

For the reasons stated in the accompanying Memorandum, it is this 25th day of May, 2001, hereby

ORDERED: that judgment is entered on behalf of plaintiffs Kenneth Beaty, Clinton Hall, William

Barloon, and David Daliberti, against defendant, Republic of Iraq, in the total amount of $12,823,289.00, allocated as follows: to Kenneth Beaty, $4,235,441.00; to Clinton Hall, $1,797,004.00; to William Barloon, $2,942,285.00; to David Daliberti, $3,848,559; and it is further

ORDERED: that judgment is entered on behalf of the spouse plaintiffs Robin Beaty, Elizabeth Hall, Linda Barloon, and Kathy Daliberti, against defendant, Republic of Iraq, for solatium, in the total amount of $6,000,000.00, to be allocated in the amount of $1,500,000.00 to each spouse; and it is further

ORDERED: that the Clerk of Court shall cause a copy of this Order and Judgment and the accompanying Memorandum to be translated into Arabic, with the costs of translation to be paid by the plaintiffs, and transmitted to the United States Department of State for diplomatic service on the defendant in accordance with the provisions of 28 U.S.C. § 1608(a)(4), and to the Iraqi Interests Section, care of the Embassy of Algeria, 1801 P Street, N.W., Washington, D.C. 20036.

APPENDIX AG

Presidential Determination No. 2003-23 of May 7, 2003

Suspending the Iraq Sanctions Act, Making Inapplicable Certain Statutory Provisions Related to Iraq, and Delegating Authorities, under the Emergency Wartime Supplemental Appropriations Act, 2003

Memorandum for the Secretary of State [and] the Secretary of Commerce

By virtue of the authority vested in me by the Constitution and the laws of the United States, including sections 1503 and 1504 of the Emergency Wartime Supplemental Act, 2003, Public Law 108-11 (the "Act"), and section 301 of title 3, United States Code, I hereby:

(1) suspend the application of all of the provisions, other than section 586E, of the Iraq Sanctions Act of 1990, Public Law 101-513, and

(2) make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, Public Law 87-195, as amended (the "FAA"), and any other provision of law that applies to countries that have supported terrorism.

In addition, I delegate the functions and authorities conferred upon the President by:

(1) section 1503 of the Act to submit reports to the designated committees of the Congress to the Secretary of Commerce, or until such time as the principal licensing responsibility for the export to Iraq of items on the Commerce Control List has reverted to the Department of Commerce, to the Secretary of the Treasury; and,

(2) section 1504 of the Act to the Secretary of State.

The functions and authorities delegated herein may be further delegated and redelegated to the extent consistent with applicable law.

The Secretary of State is authorized and directed to publish this determination in the *Federal Register.*

GEORGE W. BUSH
THE WHITE HOUSE,
Washington, May 7, 2003.

APPENDIX AH

Executive Order 13303 of May 22, 2003

Protecting the Development Fund for Iraq and Certain Other Property in Which Iraq Has an Interest

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act, as amended (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), section 5 of the United Nations Participation Act, as amended (22 U.S.C. 287c) (UNPA), and section 301 of title 3, United States Code,

I, GEORGE W. BUSH, President of the United States of America, find that the threat of attachment or other judicial process against the Development Fund for Iraq, Iraqi petroleum and petroleum products, and interests therein, and proceeds, obligations, or any financial instruments of any nature whatsoever arising from or related to the sale or marketing thereof, and interests therein, obstructs the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq. This situation constitutes an unusual and extraordinary threat to the national security and

foreign policy of the United States and I hereby declare a national emergency to deal with that threat.

I hereby order:

Section 1. Unless licensed or otherwise authorized pursuant to this order, any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is prohibited, and shall be deemed null and void, with respect to the following:

(a) the Development Fund for Iraq, and

(b) all Iraqi petroleum and petroleum products, and interests therein, and proceeds, obligations, or any financial instruments of any nature whatsoever arising from or related to the sale or marketing thereof, and interests therein, in which any foreign country or a national thereof has any interest, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons.

Sec. 2. (a) As of the effective date of this order, Executive Order 12722 of August 2, 1990, Executive Order 12724 of August 9, 1990, and Executive Order 13290 of March 20, 2003, shall not apply to the property and interests in property described in section 1 of this order.

(b) Nothing in this order is intended to affect the continued effectiveness of any rules, regulations, orders, licenses or other forms of administrative action issued, taken, or continued in effect heretofore or hereafter under Executive Orders 12722, 12724, or 13290, or under the authority of IEEPA or the

UNPA, except as hereafter terminated, modified, or suspended by the issuing Federal agency and except as provided in section 2(a) of this order.

Sec. 3. For the purposes of this order:

(a) The term "person" means an individual or entity;

(b) The term "entity" means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization;

(c) The term "United States person" means any United States citizen, permanent resident alien, entity organized under the laws of the United *31932 States or any jurisdiction within the United States (including foreign branches), or any person in the United States;

(d) The term "Iraqi petroleum and petroleum products" means any petroleum, petroleum products, or natural gas originating in Iraq, including any Iraqi-origin oil inventories, wherever located; and

(e) The term "Development Fund for Iraq" means the fund established on or about May 22, 2003, on the books of the Central Bank of Iraq, by the Administrator of the Coalition Provisional Authority responsible for the temporary governance of Iraq and all accounts held for the fund or for the Central Bank of Iraq in the name of the fund.

Sec. 4. (a) The Secretary of the Treasury, in consultation with the Secretary of State and the Secretary of Defense, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by IEEPA and the UNPA as may be necessary to carry out the purposes of this order. The Secretary of the Treasury may redelegate any of

these functions to other officers and agencies of the United States Government. All agencies of the United States Government are hereby directed to take all appropriate measures within their statutory authority to carry out the provisions of this order.

(b) Nothing contained in this order shall relieve a person from any requirement to obtain a license or other authorization in compliance with applicable laws and regulations.

Sec. 5. This order is not intended to, and does not, create any right, benefit, or privilege, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, entities, officers, employees, or agents, or any other person.

Sec. 6. This order shall be transmitted to the Congress and published in the *Federal Register*.

GEORGE W. BUSH
THE WHITE HOUSE,
May 22, 2003.

APPENDIX AI

Message to the Congress Reporting the Declaration of a National Emergency With Respect to the Development Fund for Iraq

May 22, 2003

To the Congress of the United States:

Consistent with section 204(b) of the International Emergency Economic Powers Act, 50 U.S.C. 1703(b) (IEEPA), section 5 of the United Nations Participation Act (22 U.S.C. 287c) (UNPA), and section 301 of the National Emergencies Act, 50 U.S.C. 1631, I hereby report that I have exercised my authority to declare a national emergency to deal with the unusual and extraordinary threat posed to the national security and foreign policy of the United States by the threat of attachment or other judicial process against the Development Fund for Iraq, Iraqi petroleum and petroleum products, and interests therein, and proceeds, obligations, or any financial instruments of any nature whatsoever arising from or related to the sale or marketing thereof, and interests therein.

A major national security and foreign policy goal of the United States is to ensure that the newly established Development Fund for Iraq and other Iraqi resources, including Iraqi petroleum and petroleum products, are dedicated for the well-being of the Iraqi people, for the orderly reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, for the costs of indigenous

civilian administration, and for other purposes benefiting the people of Iraq. The Development Fund for Iraq and other property in which Iraq has an interest may be subject to attachment, judgment, decree, lien, execution, garnishment, or other judicial process, thereby jeopardizing the full dedication of such assets to purposes benefiting the people of Iraq. To protect these assets, I have ordered that, unless licensed or otherwise authorized pursuant to my order, any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is prohibited, and shall be deemed null and void, with respect to the following:

(a) the Development Fund for Iraq, and

(b) all Iraqi petroleum and petroleum products, and interests therein, and proceeds, obligations, or any financial instruments of any nature whatsoever arising from or related to the sale and marketing there of, and interests therein, in which any foreign country or a national thereof has any interest, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons.

In addition, by my memorandum to the Secretary of State and Secretary of Commerce of May 7, 2003 (Presidential Determination 2003-23), I made inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, Public Law 87-195, as amended, and any other provision of law that applies to countries that have supported terrorism. Such provisions of law that apply to countries that have supported terrorism include, but are not limited to, 28 U.S.C. 1605(a)(7), 28 U.S.C. 1610, and section 201 of the Terrorism Risk Insurance Act.

I also have ordered that Executive Order 12722 of August 2, 1990, and Executive Order 12724 of August 9, 1990, which blocked property and interests in property of the Government of Iraq, its agencies, instrumentalities and controlled entities and the Central Bank of Iraq that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, including their overseas branches, and Executive Order 13290 of March 20, 2003, which confiscated and vested certain Government of Iraq accounts, shall not apply to the Development Fund for Iraq or to Iraqi petroleum or petroleum products, and interests therein, and proceeds, obligations, or any financial instruments of any nature whatsoever arising from or related to the sale and marketing thereof, and interests therein.

I have delegated to the Secretary of the Treasury, in consultation with the Secretary of State and the Secretary of Defense, the authority to take such actions as may be necessary to carry out the purposes of the Executive Order, including the promulgation of rules and regulations. I have also authorized the Secretary of the Treasury to employ all powers granted to the President by IEEPA and UNPA to carry out the purposes of the Executive Order. I am enclosing a copy of the Executive Order I have issued.

George W. Bush
The White House,
May 22, 2003.

APPENDIX AJ

Letter to Congressional Leaders Reporting on Blocking Property of the Former Iraqi Regime, Its Senior Officials and Their Family Members, and Taking Certain Other Actions

August 28, 2003

Dear Mr. Speaker: (Dear Mr. President:)

Consistent with section 204(b) of the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1703(b), and section 301 of the National Emergencies Act, 50 U.S.C. 1631, I hereby report that I have exercised my authority to expand the scope of the national emergency declared in Executive Order 13303 of May 22, 2003, to address the unusual and extraordinary threat to the national security and foreign policy of the United States posed by obstacles to the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in that country, and the development of political, administrative, and economic institutions in Iraq.

In United Nations Security Council Resolution (UNSCR) 1483 of May 22, 2003, the U.N. Security Council decided that U.N. member states shall freeze the assets of the former Iraqi regime, Saddam Hussein, and other senior officials of the former Iraqi regime, and their immediate family members and cause the transfer of those assets to the Development Fund for Iraq. The assets of the former Iraqi regime, Saddam Hussein, and other senior Iraqi officials have

already been frozen pursuant to the Iraqi Sanctions Regulations, 31 C.F.R. part 575, which implemented the 1990 Executive Orders that imposed economic sanctions with respect to Iraq. The order that I have now issued broadens the scope of persons whose assets may be frozen under those orders by adding the immediate family members of former Iraqi senior officials whose assets may be frozen. This order also allows for the confiscating and vesting of some of those assets and provides for the transfer of all vested assets to the Development Fund for Iraq in a manner consistent with paragraph 23 of UNSCR 1483. The Development Fund for Iraq will be used by the Coalition Provisional Authority in a transparent manner to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, for the costs of Iraqi civilian administration, and for other purposes benefiting the Iraqi people. By this order and related measures, the United States Government is implementing the requirements of paragraph 23 of UNSCR 1483.

Among other measures, unless licensed or otherwise authorized pursuant to this order, any attachment, judgment, decree, lien, execution, garnishment, or other judicial process with respect to assets blocked pursuant to this order is prohibited by section 1 of this order. I further note that Presidential Determination No. 2003-23 issued on May 7, 2003, made inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, Public Law 87-195, as amended, and any other provision of law that applies to countries that have supported terrorism, including, but not limited to, 28 U.S.C. 1605(a)(7), 28

U.S.C. 1610, and section 201 of the Terrorism Risk Insurance Act.

I have ordered that all property and interests in property of the former Iraqi regime or its state bodies, corporations, or agencies, or of the following persons, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(a) the persons listed in the Annex to this order; and

(b) persons determined by the Secretary of the Treasury, in consultation with the Secretary of State,

(i) to be senior officials of the former Iraqi regime or their immediate family members; or

(ii) to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any of the persons listed in the Annex to this order or determined to be subject to this order.

I have authorized the Secretary of the Treasury, in consultation with the Secretary of State, to confiscate property that is blocked pursuant to this order and that he determines, in consultation with the Secretary of State, to belong to a person, organization, or country that has planned, authorized, aided, or engaged in armed hostilities against the United States. All right, title, and interest in any property so confiscated shall vest in the Department of the Treasury and shall promptly be transferred to the Development Fund for Iraq.

I have delegated to the Secretary of the Treasury, in consultation with the Secretary of State, the authority to take such actions as may be necessary to carry out the purposes of my order, including the promulgation of rules and regulations. I have also authorized the Secretary of the Treasury, in consultation with the Secretary of State, to employ all powers granted to me by IEEPA and by section 5 of the United Nations Participation Act, 22 U.S.C. 287c, to carry out the purposes of this order.

I am enclosing a copy of the executive order I have issued. The order is effective at 12:01 a.m. EDT on August 29, 2003.

Sincerely,

George W. Bush

* * * * *

APPENDIX AK

S. Con. Res. 61 Agreed to December 19, 2007

One Hundred Tenth Congress
of the
United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Thursday,
the fourth day of January, two thousand and seven

Concurrent Resolution

Resolved by the Senate (the House of Representatives concurring), That when the Senate recesses or adjourns on any day from Tuesday, December 18, 2007, through Monday, December 31, 2007, on a motion offered pursuant to this concurrent resolution by its Majority Leader or his designee, it stand adjourned sine die, or until such day and time as may be specified in the motion to recess or adjourn, or until the time of any reassembly pursuant to section 3 of this concurrent resolution, whichever occurs first; and that when the House adjourns on any legislative day from Tuesday, December 18, 2007, through Saturday, December 22, 2007, on a motion offered pursuant to this concurrent resolution by its Majority Leader or his designee, it stand

adjourned sine die, or until the time of any reassembly pursuant to section 3 of this concurrent resolution.

SEC. 2. When the Senate recesses or adjourns on Thursday, January 3, 2008, on a motion offered pursuant to this concurrent resolution by its Majority Leader or his designee, it shall stand recessed or adjourned until noon on Tuesday, January 22, 2008, or such other time on that day as may be specified in the motion to recess or adjourn, or until the time of any reassembly pursuant to section 3 of this concurrent resolution, whichever occurs first; and when the House adjourns on the legislative day of Thursday, January 3, 2008, on a motion offered pursuant to this concurrent resolution by its Majority Leader or his designee, it shall stand recessed or adjourned until noon on Tuesday, January 15, 2008, or until the time of any reassembly pursuant to section 3 of this concurrent resolution, whichever occurs first.

SEC. 3. The Majority Leader of the Senate and the Speaker of the House, or their respective designees, acting jointly after consultation with the Minority Leader of the Senate and the Minority Leader of the House, shall notify Members of the Senate and the House, respectively, to reassemble at such a place and time as they may designate if, in their opinion, the public interest shall warrant it.

Attest:

Secretary of the Senate.

Attest:

Clerk of the House of Representatives.

APPENDIX AL

Memorandum to the House of Representatives Returning Without Approval the "National Defense Authorization Act for Fiscal Year 2008"

December 28, 2007

I am withholding my approval of H.R. 1585, the "National Defense Authorization Act for Fiscal Year 2008," because it would imperil billions of dollars of Iraqi assets at a crucial juncture in that nation's reconstruction efforts and because it would undermine the foreign policy and commercial interests of the United States.

The economic security and successful reconstruction of Iraq have been top priorities of the United States. Section 1083 of H.R. 1585 threatens those key objectives. Immediately upon enactment, section 1083 would risk the freezing of substantial Iraqi assets in the United States—including those of the Development Fund for Iraq (DFI), the Central Bank of Iraq (CBI), and commercial entities in the United States in which Iraq has an interest. Section 1083 also would expose Iraq to new liability of at least several billion dollars by undoing judgments favorable to Iraq, by foreclosing available defenses on which Iraq is relying in pending litigation, and by creating a new Federal cause of action backed by the prospect of punitive damages to support claims that may previously have been foreclosed. This new

liability, in turn, will only increase the potential for immediate entanglement of Iraqi assets in the United States. The aggregate financial impact of these provisions on Iraq would be devastating.

While my Administration objected to an earlier version of this provision in previous communications about the bill, its full impact on Iraq and on our relationship with Iraq has become apparent only in recent days. Members of my Administration are working with Members of Congress to fix this flawed provision as soon as possible after the Congress returns.

Section 1083 would establish unprecedented legal burdens on the allocation of Iraq's funds to where they are most needed. Since the fall of Saddam Hussein, I have issued Executive Orders to shield from entanglement in lawsuits the assets of the DFI and the CBI. I have taken these steps both to uphold international legal obligations of the United States and to remove obstacles to the orderly reconstruction of Iraq. Section 1083 potentially would place these crucial protections of Iraq's core assets in immediate peril, by including a provision that might be misconstrued to supersede the protections I have put in place and to permit the judicial attachment of these funds. Iraq must not have its crucial reconstruction funds on judicial hold while lawyers argue and courts decide such legal assertions.

Moreover, section 1083 would permit plaintiffs to obtain liens on certain Iraqi property simply by filing a notice of pending action. Liens under section 1083 would be automatic upon filing a notice of a pending claim in a judicial district where Iraq's property is located, and they would reach property up to the amount of the judgment plaintiffs choose to demand

in their complaints. Such pre-judgment liens, entered before claims are tested and cases are heard, are extraordinary and have never previously been available in suits in U.S. courts against foreign sovereigns. If permitted to become law, even for a short time, section 1083's attachment and lien provisions would impose grave—indeed, intolerable—consequences on Iraq.

Section 1083 also includes provisions that would expose Iraq to increased liability in lawsuits. Contrary to international legal norms and for the first time in U.S. history, a foreign sovereign would be liable for punitive damages under section 1083. Section 1083 removes defenses common for defendants in the United States—including *res judicata*, collateral estoppel, and statutes of limitation—upon which the Iraqi government has relied. And section 1083 would attempt to revive a $959 million judgment against the new democratic Government of Iraq based on the misdeeds of the Saddam Hussein regime.

Exposing Iraq to such significant financial burdens would weaken the close partnership between the United States and Iraq during this critical period in Iraq's history. If Iraq's assets are frozen, even temporarily, that could reduce confidence in the Iraqi dinar and undermine the success of Iraq's monetary policy. By potentially forcing a close U.S. ally to withdraw significant funds from the U.S. financial system, section 1083 would cast doubt on whether the United States remains a safe place to invest and to hold financial assets. Iraqi entities would be deterred from engaging in commercial partnerships with U.S. businesses for fear of entangling assets in lawsuits. Section 1083 would be viewed with alarm

by the international community and would invite reciprocal action against United States assets abroad.

The adjournment of the Congress has prevented my return of H.R. 1585 within the meaning of Article I, section 7, clause 2 of the Constitution. Accordingly, my withholding of approval from the bill precludes its becoming law. *The Pocket Veto Case*, 279 U.S. 655 (1929). In addition to withholding my signature and thereby invoking my constitutional power to "pocket veto" bills during an adjournment of the Congress, I am also sending H.R. 1585 to the Clerk of the House of Representatives, along with this memorandum setting forth my objections, to avoid unnecessary litigation about the nonenactment of the bill that results from my withholding approval and to leave no doubt that the bill is being vetoed.

This legislation contains important authorities for the Department of Defense, including authority to provide certain additional pay and bonuses to servicemembers. Although I continue to have serious objections to other provisions of this bill, including section 1079 relating to intelligence matters, I urge the Congress to address the flaw in section 1083 as quickly as possible so I may sign into law the National Defense Authorization Act for Fiscal Year 2008, as modified. I also urge the Congress to ensure that any provisions affecting servicemember pay and bonuses, as well as provisions extending expiring authorities, are retroactive to January 1, 2008.

George W. Bush

The White House,
December 28, 2007.

APPENDIX AM

Thursday, January 3, 2008
Daily Digest

HIGHLIGHTS

Second Session of the One Hundred Tenth Congress convened as prescribed by the Constitution of the United States.

Senate

Chamber Action

Senate met in a pro forma session to convene the second session of the 110th Congress at 12:04:26, and recessed at 12:05:12 noon until 9 a.m., on Monday, January 7, 2008.

Committee Meetings

No committee meetings were held.

House of Representatives

Chamber Action

Public Bills and Resolutions Introduced: There were no Public Bills or Resolutions introduced in today's Record.

Additional Cosponsors: There were no Additional Cosponsors in today's Record.

Report Filed: A report was filed today as follows: H.R. 3524, to reauthorize the HOPE VI program for revitalization of severely distressed public housing, with an amendment (H. Rept. 110-507, 110th Congress, 1st Session). **Page H1**

Speaker: Read a letter from the Speaker wherein she appointed Representative Crowley to act as Speaker Pro Tempore for today. **Page H1**

Chaplain: The prayer was offered by the guest Chaplain, Monsignor Stephen J. Rossetti, President, St. Luke Institute, Silver Spring, Maryland. **Page H1**

Convening of the Second Session of the 110th Congress: The Chair announced that, pursuant to section 3 of H. Res. 877, 110th Congress, organizational and legislative business is dispensed with on this day. Bills and resolutions introduced today will be numbered today but will not be noted in the Record or referred until January 15, 2008. **Page H1**

Quorum Calls—Votes: There were no Yea and Nay votes, and there were no Recorded votes. There were no quorum calls.

Adjournment: The House met at 12 noon and pursuant to S. Con. Res. 61, 110th Congress, adjourned at 12:03 p.m. until noon on Tuesday, January 15, 2008.

Committee Meetings

No committee meetings were held.

Next Meeting of the SENATE

9 a.m., Monday, January 7

Senate Chamber

Program for Monday: Senate will meet in a pro forma session.

Next Meeting of the HOUSE OF REPRESENTATIVES

12 noon, Tuesday, January 15

House Chamber

Program for Tuesday, January 15th: To be announced.

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APPENDIX AN

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2008

SPEECH OF
HON. JOHN CONYERS, JR.
OF MICHIGAN
IN THE HOUSE OF REPRESENTATIVES
Wednesday, January 16, 2008

Mr. CONYERS. Madam Speaker, the provision that caused the President to veto the entire Defense bill simply reaffirms the original intent of Congress to allow victims of terrorism to hold countries that commit or provide material support for terrorist acts accountable. As a principal author of the provision, I am pleased that we were able to salvage much of it. But I am disappointed in the change that the President has insisted on.

The President has decided that it is of utmost importance to shield the Iraqi Government from suits by American soldiers who were brutally tortured by the Iraqi Government under Saddam Hussein, as prisoners of war during the gulf war. The soldiers were not only starved, denied sleep, and exposed to extreme temperatures. They were severely beaten, threatened with castration and dismemberment, and put through mock executions. As a result, they have sustained lasting physical and mental injuries.

These brave soldiers and their families have been waiting many years for justice in our courts. The President, through the actions of his lawyers in the courts, has endeavored to block their progress at every turn. He has even gone so far as to twist a provision Congress included in the Emergency Wartime Supplemental Appropriations Act of 2003, designed to remove restrictions on providing assistance to the new Iraqi Government, into an astonishing claim that Congress somehow implicitly thereby gave him authority to block court jurisdiction over suits against Iraq—a claim that disregards the understanding of those involved in negotiating that provision, as well as article III of the Constitution and the separation of powers.

And now, despite these new congressional efforts to help those soldiers, the President wants them to continue to wait—for the good, he says, of the new Iraqi Government. In order for the Defense bill to be signed, my colleagues and I have reluctantly had to amend this provision to allow the President to carve out the Iraqi Government entirely.

It is important to note that this change does not affect rights under current law. The President's waiver authority extends only to the provisions being newly enacted in this bill; by its clear terms, it does not extend to current law. There is ongoing litigation regarding the rights of these American soldiers under current law; if the President exercises his new waiver authority, that litigation will proceed unaffected by that waiver.

The difference is that, if the President exercises the waiver authority, these soldiers will not be helped by this new provision we wrote and passed, as we wanted them to be, and as they would be absent the

waiver. I believe current law, properly interpreted, already gives them the protection they need to obtain justice. Among other things, I believe it is clear, despite the administration's assertions and one aberrational court holding to the contrary, that Congress intended the 1996 amendment to the Foreign Sovereign Immunities Act to provide an explicit Federal statutory cause of action against state sponsors of terrorism for the victims. That intent is stated explicitly, among other places, in the House Judiciary Committee's report for the bill in the previous Congress, H. Rept. 103-702.

In the face of sustained efforts by the President to persuade the courts to disregard congressional intent, we wanted to give these soldiers, and other victims of state-sponsored terrorism, another clear path to obtaining justice. But the soldiers who suffered at the hands of Saddam Hussein will not get the benefit of this other clear path if the President exercises his waiver authority, as we expect he will.

And there is always a risk that the courts will be persuaded by the arguments of the President and his lawyers, and reach what we believe would be the wrong interpretation, and deny the soldiers' claims under current law. If so, then the waiver will have the effect of further delaying justice, and a very real possibility of making it harder to obtain at all. Because even though the waiver cannot permanently and irrevocably extinguish their claims, another delay may make it all the more difficult to gather the proof when those claims can once again be pursued.

For all these reasons, we did not want to make this change.

And when we ultimately concluded that the President was willing to hold the entire Defense bill hostage unless we did, we tried to limit the harm.

We wanted the President to have to weigh the interests of the victims in justice, and victims, why he believes those interests are outweighed by the interests of the Iraqi Government, and why he believes those interests cannot fairly be reconciled.

We wanted him to have to explain in those findings why he believes it necessary to shelter all of Iraq's assets from legal accountability, even when Iraq is reaping billions upon billions of dollars from its oil fields.

We wanted the President to have to reaffirm those findings periodically, so that they would not be set in stone.

And we wanted a sunset, to bring a definite end to what we believe is a manifest injustice.

Unfortunately, we were not able to achieve these goals.

What we have been able to do, instead, is to add a new sense of the Congress that the President should work with the Government of Iraq to get fair compensation to these victims. That is, of course, non-binding; but it could also create a new path to justice. And I hope the President will take it to heart, and act on it, and that through one of these paths, the victims will see some semblance of the justice they have been struggling for these many years.

Otherwise, I think the President will have done a grave disservice to these soldiers, who are only 17 in number, and whose treatment at the hands of our enemies, in the service of their country, calls for greater respect than they have been getting.

APPENDIX AO

Tuesday, January 22, 2008
Daily Digest

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Senate

* * * * *

National Defense Authorization Act: By 91 yeas and 3 nays (Vote No. 1), Senate passed H.R. 4986, to provide for the enactment of the National Defense Authorization Act for Fiscal Year 2008, as previously enrolled, with certain modifications to address the foreign sovereign immunities provisions of title 28, United States Code, with respect to the attachment of property in certain judgments against Iraq, the lapse of statutory authorities for the payment of bonuses, special pays, and similar benefits for members of the uniformed services, clearing the measure for the President.

Pages S54-57

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APPENDIX AP

Presidential Determination No. 2008-9 of January 28, 2008

Waiver of Section 1083 of the National Defense Authorization Act for Fiscal Year 2008

Memorandum for the Secretary of State

By the authority vested in me as President by the Constitution and the laws of the United States, including section 301 of title 3, United States Code, and section 1083(d) of the National Defense Authorization Act for Fiscal Year 2008 (the "Act"), I hereby determine that:

- All provisions of section 1083 of the Act, if applied to Iraq or any agency or instrumentality thereof, may affect Iraq or its agencies or instrumentalities, by exposing Iraq or its agencies or instrumentalities to liability in United States courts and by entangling their assets in litigation.

- The economic security and successful reconstruction of Iraq continue to be top national security priorities of the United States. Section 1083 of the Act threatens those key priorities. If permitted to apply to Iraq, section 1083 would risk the entanglement of substantial Iraqi assets in litigation in the United States including those of the Development Fund for Iraq, the Central Bank of Iraq, and commercial entities in the

United States in which Iraq has an interest. Section 1083 also would expose Iraq to new liability of at least several billion dollars by undoing judgments favorable to Iraq, by foreclosing available defenses on which Iraq is relying in pending litigation, and by creating a new Federal cause of action backed by the prospect of punitive damages to support claims that may previously have been foreclosed. If permitted to apply to Iraq, section 1083 would have a significant financial impact on Iraq and would result in the redirection of financial resources from the continued reconstruction of Iraq and the harming of Iraq's stability, contrary to the interests of the United States.

• A waiver of all provisions of section 1083 with respect to Iraq and any agency or instrumentality of Iraq is therefore in the national security interest of the United States and will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq.

• Iraq continues to be a reliable ally of the United States and a partner in combating acts of international terrorism. The November 26, 2007, Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship between the Republic of Iraq and the United States of America confirmed the commitment of the United States and Iraq to build an enduring relationship in the political, diplomatic, economic, and security arenas and to work together to combat all terrorist groups, including al-Qaida.

Accordingly, I hereby waive all provisions of section 1083 of the Act with respect to Iraq and any agency or instrumentality thereof.

You are authorized and directed to notify the Congress of this determination and waiver and the accompanying memorandum of justification, incorporated by reference herein, and to arrange for their publication in the *Federal Register*.

GEORGE W. BUSH
THE WHITE HOUSE,
Washington, January 28, 2008.

MEMORANDUM OF JUSTIFICATION FOR WAIVER OF SECTION 1083 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2008 WITH RESPECT TO IRAQ

Section 1083 of the National Defense Authorization Act for Fiscal Year 2008 (the "Act") amends the Foreign Sovereign Immunities Act, which establishes a framework for lawsuits against foreign countries and their agencies and instrumentalities under U.S. law. Immediately upon enactment, Section 1083 would put at risk substantial Iraqi assets in the United States that are crucial to Iraq's recovery efforts—including the Development Fund for Iraq, the assets of the Central Bank of Iraq held by the Federal Reserve Bank of New York, and assets of Iraqi agencies or instrumentalities used in commercial transactions in the United States. Section 1083 would also expose Iraq to potential new

liability by undoing judgments favorable to Iraq, by foreclosing available defenses on which Iraq has relied, and by creating a new Federal cause of action backed by punitive damages. Any and all provisions of section 1083 may adversely affect Iraq or its agencies or instrumentalities, by exposing Iraq or its agencies or instrumentalities to liability in United States courts and by entangling their assets in litigation. Such burdens would undermine the national security and foreign policy interests of the United States, including by weakening the ability of the democratically-elected government of Iraq to use Iraqi funds to promote political and economic progress and further develop its security forces.

Section 1083(d)(l)-(3) of the Act provides that:

(d) Applicability to Iraq-

(1) APPLICABILITY- The President may waive any provision of this section with respect to Iraq, insofar as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof, if the President determines that—

(A) the waiver is in the national security interest of the United States;

(B) the waiver-will promote the reconstruction of, the-consolidation of democracy in, and the relations of the United States with, Iraq; and

(C) Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.

(2) TEMPORAL SCOPE.—The authority under paragraph (1) shall apply

(A) with respect to a conduct or event occurring before or on the date of the enactment of this Act;

(B) with respect to any conduct or event occurring before or on the date of the exercise of that authority; and

(C) regardless of whether, or the extent to which, the exercise of that authority affects any action filed before, on, or after the date of the exercise of that authority or of the enactment of this Act.

(3) NOTIFICATION TO CONGRESS.—A waiver by the President under paragraph (1) shall cease to be effective 30 days after it is made unless the President has notified Congress in writing of the basis for the waiver as determined by the President under paragraph (1).

A waiver of all provisions of section 1083 with respect to Iraq, and all agencies and instrumentalities thereof, is in the national security interest of the United States and will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq. In particular:

• Absent a waiver, section 1083 would have a potentially devastating impact on Iraq's ability to use Iraqi funds to expand and equip the Iraqi Security Forces, which would have serious implications for U.S. troops in the field acting as part of the Multinational Force-Iraq and would harm anti-terrorism and counter-insurgency efforts.

• Application of section 1083 to Iraq or any agency or instrumentality thereof will hurt the interests of the United States by unacceptably interfering with

political and economic progress in Iraq that is critically important to bringing U.S. troops home.

- If applied to Iraq or any agency or instrumentality thereof, the provisions of section 1083 would redirect financial resources from the continued reconstruction of Iraq and would harm Iraq's stability, contrary to the interests of the United States. A waiver will ensure that Iraqi assets of the Central Bank of Iraq, the government and commercial entities in which Iraq has an interest, remain available to maintain macroeconomic stability in Iraq and support private-sector development and trade.

- By providing for the maintenance of macroeconomic stability, the waiver of section 1083 will promote the consolidation of democracy in Iraq.

- Absent a waiver of section 1083, Iraq's ability to finance employment alternatives, vocational training, and job placement programs necessary to promote community reintegration and development efforts contributing to counterterrorism efforts would be harmed.

- By ensuring that Iraq and its agencies and instrumentalities are not subject to litigation or liability pursuant to section 1083, waiver of section 1083 will promote the close relationship between the United States and Iraq.

In addition, Iraq continues to be a reliable ally of the United States and partner in-combating acts of international terrorism. The November 26, 2007 Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship between the Republic of Iraq and the United States of America confirmed the commitment of the United

States and Iraq to build an enduring relationship in the political, diplomatic, economic, and security arenas and to work together to combat all terrorist groups and international terrorism, including al-Qaida. This Declaration reinforced the crucial actions Iraq is taking against terrorists groups, including al-Qaida.

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Nos. 07-1090 & 08-539

Supreme Court, U.S.
FILED
FEB 19 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

REPUBLIC OF IRAQ,

Petitioner,

v.

JORDAN BEATY, et al.,

Respondents.

REPUBLIC OF IRAQ, et al.,

Petitioners,

v.

ROBERT SIMON, et al.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Republic of Iraq possesses sovereign immunity from the jurisdiction of the courts of the United States in cases involving alleged misdeeds of the Saddam Hussein regime that are predicated on the exception to immunity in former 28 U.S.C. § 1605(a)(7).

PARTIES TO THE PROCEEDINGS

Petitioners are the Republic of Iraq, which was a defendant and appellant below in No. 07-1090 ("*Beaty*") and defendant and appellee in No. 08-539 ("*Simon / Seyam*"), and Jalal Talibani in his official capacity as President of Iraq, who is a defendant in the *Simon / Seyam* cases. Pursuant to S. Ct. R. 35.3, President Talibani has been substituted for Saddam Hussein, who was named as a defendant in the *Simon / Seyam* cases but is now deceased. The Iraqi Intelligence Service ("IIS") was also a named defendant in the *Simon / Seyam* cases, but it has since been dissolved. *See* Coalition Provisional Authority Order No. 2 (May 23, 2003) (www.iraqcoalition.org/regulations/20030823_CPAORD_2_Dissolution_of_Entities_with_Annex_A.pdf). To the extent the former IIS nevertheless remains a party, IIS is also a petitioner. *See* 08-539 Pet. at ii.

Respondents are (a) Jordan Beaty; Austin Makenzie Beaty, a minor by her next friend Robin Beaty; William R. Barloon; Bryan C. Barloon; and Rebecca L. Barloon, who were plaintiffs and appellees below in *Beaty*; and (b) Robert Simon; Françoise Simon; Robert Alvarez; Roberto Alvarez; Islamic Society of Wichita (substituted in the Court of Appeals for Nabil Seyam); Ahmad Seyam; Yusef Seyam; Melissa Seyam; and Carrie Seyam, who were plaintiffs and appellants below in the *Simon / Seyam* cases.

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IN THE

Supreme Court of the United States

Nos. 07-1090 & 08-539

REPUBLIC OF IRAQ,

Petitioner,

v.

JORDAN BEATY, et al.,

Respondents.

REPUBLIC OF IRAQ, et al.,

Petitioners,

v.

ROBERT SIMON, et al.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The unreported order of the D.C. Circuit granting summary affirmance in *Beaty* is reproduced at JA313. The District Court's opinion is reported at 480 F. Supp. 2d 60 and is reproduced at JA219. The opinion of the D.C. Circuit in *Simon/Seyam* is

reported at 529 F.3d 1187 and is reproduced at JA317. The District Court's opinion is reported at 459 F. Supp. 2d 10 and is reproduced at JA188.

JURISDICTION

In *Beaty*, the judgment of the D.C. Circuit was entered on November 21, 2007. JA313. In *Simon / Seyam*, the judgment of the D.C. Circuit was entered on June 24, 2008. JA339. This Court granted petitioners' timely petitions for certiorari on January 9, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of relevant statutes is set forth in the appendix to this brief.

INTRODUCTION

The question in this case is whether the sovereign immunity of petitioner Republic of Iraq ("Iraq")—now an important, democratic ally of the United States—has been restored through actions of Congress and the President. These actions implemented crucial foreign policy and diplomatic determinations that reflect the two nations' new relationship following the ouster of the former Iraqi regime. The lower court countermanded foreign policy judgments made by the President pursuant to broad statutory authorization, and held that Iraq is not entitled to the same sovereign immunity that applies to other U.S. allies.

That decision was manifestly erroneous for each of two reasons. First, in 2003, the President exercised the full authority Congress granted him to "make inapplicable with respect to Iraq * * * *any* * * * provision of law that applies to countries that have supported terrorism." Emergency Wartime

Supplemental Appropriations Act, 2003 ("EWSAA"), Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579 (emphasis added). As the President properly determined, this statute authorized him to immediately make inapplicable as to Iraq former 28 U.S.C. § 1605(a)(7), a jurisdictional exception to Iraq's sovereign immunity that applied *only* to countries that have supported terrorism. Because that provision is the only asserted or arguable basis for abrogation of Iraq's sovereign immunity—and thus the existence of subject matter jurisdiction—in these cases, the cases may not proceed.

Second, regardless of the President's 2003 actions, in the National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), Pub. L. No. 110-181, § 1083, 122 Stat. 338, Congress (1) *repealed* 28 U.S.C. § 1605(a)(7); and (2) simultaneously replaced that statute with a new jurisdictional exception to immunity, which it provided the President with authority to waive as to Iraq; and (3) the President then waived application of that exception as to Iraq under the new authority Congress expressly granted him. For this reason as well, there is no basis for subject matter jurisdiction in these cases.

Implementing clear statutory authority and important foreign policy judgments, the President determined that claims against the new democratic government of Iraq based on the actions of the deposed Saddam Hussein regime should be addressed diplomatically, just as claims against allied nations for the actions of prior hostile regimes have been addressed in the past. Whether considered under the EWSAA or the NDAA, the lower court's refusal in both *Beaty* and *Simon/Seyam* to recognize the restoration of Iraq's basic sovereign

immunity is contrary to law and, if upheld, would threaten critical U.S. foreign policy objectives and the important U.S.-Iraq alliance.

STATEMENT OF THE CASE

A. Foreign Sovereign Immunity And The State-Sponsor-Of-Terrorism Exception.

"[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States." *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). Before passage of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), "initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive." *Id.* at 487. Even where a court's jurisdiction had previously attached against a foreign sovereign, that jurisdiction would be "surrendered on recognition, allowance, and certification of the asserted immunity by the political branch of the government charged with the conduct of foreign affairs." *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 34 (1945).

Because judicial proceedings against a foreign sovereign or its possessions "may be regarded as such an affront to its dignity and may so affect our relations with it," it was "an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination" to accord immunity. *Id.* at 35-36. The court would then "remit the [plaintiff] to the relief obtainable through diplomatic negotiations." *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943).

In 1976, the FSIA codified foreign sovereign immunity. The original statute adopted the "restrictive" theory, which immunized a foreign sov-

ereign's "public acts" but not its "strictly commercial acts." *Verlinden*, 461 U.S. at 487. The underlying acts in the present cases were allegedly committed between 1991 and 1995. Because the acts were noncommercial, the FSIA accorded Iraq's government under Saddam Hussein immunity from U.S. jurisdiction for such acts. *See, e.g., Saudi Arabia* v. *Nelson*, 507 U.S. 349, 359-360 (1993).

In 1996, however, Congress enacted a new immunity exception, formerly codified at 28 U.S.C. § 1605(a)(7) ("former Section 1605(a)(7)"), that applied only to nations designated by the State Department as "state sponsors of terrorism." Reflecting U.S hostility to such regimes, that provision abrogated immunity for certain claims involving "an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources * * * for such an act." 28 U.S.C. § 1605(a)(7) (2000) (repealed). Iraq once was, but no longer is, a designated "state sponsor of terrorism." *See* 55 Fed. Reg. 37,793 (1990); 69 Fed. Reg. 61,702 (2004).

One of many sanctions imposed by the United States against state sponsors of terrorism, Section 1605(a)(7) represented a "sudden and dramatic shift" from the restrictive theory of immunity, because it authorized, for the first time, suits against foreign states for noncommercial acts committed abroad. Daveed Gartenstein-Ross, *A Critique of the Terrorism Exception to the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. Int'l L. & Pol. 887, 898 (2002). Even as to outlaw states, this abrogation of immunity was unusual in international relations; as of 2002, "no other countries ha[d] implemented legislation similar to the terrorism exception, with

the sole exception of retaliatory legislation aimed at the United States." *Id.*[1]

B. The President's EWSAA Determination.

On October 16, 2002, Congress authorized the President to use military force against Iraq. *See* Pub. L. No. 107-243, 116 Stat. 1498 (2002). Five months later, the United States led a coalition of military forces into Iraq. By May 1, 2003, major combat operations had ended and the Saddam Hussein regime had been ousted. *See* Amy Goldstein & Karen DeYoung, *Bush to Say Major Combat Has Ended*, Wash. Post, May 1, 2003, at A18. The focus of the United States then shifted immediately to reconstructing Iraq and helping the Iraqi people develop a new, democratic government.

Shortly after the invasion, Congress passed the EWSAA to fund operations in Iraq and begin providing for the reconstruction. Section 1503 of that law provided, *inter alia*, that "the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961"—a specific sanctions law applying to state sponsors of terrorism—"or *any other provision of law that applies to countries that have supported terrorism*." EWSAA § 1503 (emphasis added).

On May 7, 2003, President Bush issued Presidential Determination No. 2003-23, which lifted various other sanctions against Iraq and expressly exercised the full extent of his EWSAA authority to make inapplicable with respect to Iraq "*any * * * provision of law* that applies to countries that have supported terrorism." 68 Fed. Reg. 26,459 (2003)

[1] This retaliatory legislation was not enacted by Iraq. *Id.* at 918 n.153.

(emphasis added) (JA396). On May 22, 2003, the President confirmed to Congress that this action included rendering former Section 1605(a)(7) inapplicable with respect to Iraq. *Message to the Congress*, 39 Weekly Comp. Pres. Doc. 647, 647-48 (May 22, 2003) (provisions of law made inapplicable "include, but are not limited to, 28 U.S.C. 1605(a)(7)") (JA403). The effect of that determination should have been to render Iraq once again immune from the jurisdiction of the courts of the United States in these and similar cases.

Also on May 22, 2003, the President issued Executive Order 13,303, in which he declared that the threat of judicial process against Iraqi assets "obstructs the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq." 68 Fed. Reg. 31,931 (2003). The President declared that "[t]his situation constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States." *Id.*

The Executive Order prohibited attachments against numerous Iraqi assets. In his message to Congress, the President declared that it is "[a] major national security and foreign policy goal of the United States" to ensure that all "Iraqi resources"—not merely those that were the main subject of the Order—are dedicated to reconstruction of Iraq and "other purposes benefiting the people of Iraq." JA402-03. He explained that he had taken actions to protect Iraqi property from judicial process, which "jeopardiz[ed] the full dedication of such assets to purposes benefiting the people of Iraq." JA403. The President stated that one of these actions was his

earlier Determination making Section 1605(a)(7) inapplicable to Iraq. *Id.* Thus, the President effectively confirmed that these cases, and others like them, pose a threat to the national security and foreign policy goals that he had identified.

C. The Complaints.

1. *Beaty.*

The *Beaty* plaintiffs are the children of Kenneth Beaty and William Barloon. In 1996, these men and their spouses sued Iraq in an earlier case, under the auspices of former Section 1605(a)(7), alleging improper detention and treatment by the Saddam Hussein regime in 1993 and 1995. *See* JA383-87. The Beatys and Barloons obtained—and ultimately recovered on—a default judgment for more than $10 million. *See Daliberti* v. *Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001); Order, *Daliberti* v. *Fed. Reserve Bank of N.Y.*, No. 1:03-cv-01055-JES (S.D.N.Y. Mar. 14, 2003).

The current plaintiffs were not present in Iraq during their fathers' detention. *See* JA183-84 (¶¶ 23, 24). Nevertheless, on March 10, 2003, they filed this Section 1605(a)(7) case against Iraq seeking additional millions of dollars for "emotional distress" they allegedly suffered because of their fathers' treatment. The plaintiffs subsequently clarified that they were suing under the common law of the states where they lived. JA180.

2. *Simon/Seyam.*

Simon / Seyam consists of two consolidated cases, *Simon* v. *Republic of Iraq* and *Seyam* v. *Republic of Iraq*. Plaintiffs Robert Simon, Roberto Alvarez, and Nabil Seyam (now deceased) alleged that they were taken prisoner and mistreated by the former Iraqi

regime in 1991, during the First Gulf War. JA166, JA176. Mr. Simon and Mr. Alvarez were released after six weeks of detention. JA166. Mr. Seyam was released after eighteen days. JA176.

In 2003—more than 12 years after the underlying events and nearly seven years after Section 1605(a)(7)'s enactment—these plaintiffs and family members filed suit against Iraq under that provision seeking more than $243 million in compensatory and punitive damages as a result of the alleged mistreatment by the prior regime. The plaintiffs allege causes of action under District of Columbia law.[2]

In May 2005, the trial judge consolidated *Simon* and *Seyam* with another similar case on his docket, *Vine* v. *Republic of Iraq*, No. 01-CV-2674. *Vine* remains pending in the trial court and involves 236 plaintiffs. Including *Vine* and the present cases, Iraq is subject to pending lawsuits brought under former Section 1605(a)(7) that collectively seek more than $3 billion in damages.[3]

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[2] The *Simon/Seyam* defendants are the Republic of Iraq, then-President Saddam Hussein (for whom President Talibani has been substituted) and the since-dissolved IIS. *See supra* at ii. Because the FSIA and former Section 1605(a)(7) are the only asserted or arguable bases for jurisdiction over all defendants, JA162, JA172, all arguments in this brief apply to all defendants. *See also* JA202-03 (plaintiffs' assertion, as to all defendants, of 10-year statute of limitations applicable to Section 1605(a)(7) actions).

[3] *See Vine* v. *Republic of Iraq*, No. 01-2674 (D.D.C.) (claims for $400 million); *Acree* v. *Republic of Iraq*, No. 06-723 (D.D.C.) (renewed complaint seeking to reinstate claims for $959 million); *Lawton* v. *Republic of Iraq*, No. 02-474 (D.D.C.) (claims for more than $125 million in actual damages and $1.4 billion in punitive damages); *In re Terrorist Attacks on September 11, 2001*, No. 03-MDL-1570 (S.D.N.Y.) (asserted liability against all

D. The *Acree* Decision And The *Beaty* Proceedings.

In March 2004, the United States urged dismissal of *Beaty*, asserting that the President's EWSAA Determination had restored Iraq's sovereign immunity. *See* JA64. The United States also elucidated the key foreign policy concerns that had led the President to issue that Determination and make it applicable to Section 1605(a)(7). It stated that adjudication of the case poses "a serious threat to the crucial foreign policy goal of promptly rebuilding Iraq into a democratic, self-sustaining nation," would "significantly interfere with the successful establishment of a new, peaceful government," and "stand[s] as an obstacle to achieving the Nation's foreign policy goals." JA78, JA79, JA83.

On June 4, 2004, however, the D.C. Circuit held in *Acree* v. *Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), that the President's EWSAA determination exceeded his statutory authority. Although Iraq was the named defendant in that case, *Acree* involved different plaintiffs and different claims from the present cases, and Iraq did not appear in *Acree* either in the District Court or the D.C. Circuit. Instead, the United States intervened to appeal a $959 million default judgment against Iraq, arguing that the President's determination to render former

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defendants of more than $1 trillion); JA184 (*Beaty* complaint seeking $2,176,000); JA169, JA179 (*Simon* and *Seyam* complaints seeking more than $243,000,000); *Kalasho* v. *Republic of Iraq*, No. 06-11030 (E.D. Mich.) (claims for more than $10 million); *see also Hill* v. *Republic of Iraq*, No. 99-03346 (D.D.C.) (default judgments for more than $172 million); *Smith* v. *Islamic Emirate of Afg.*, 262 F. Supp. 2d 217 (S.D.N.Y. 2003) (default judgment against Iraq for more than $63 million).

Section 1605(a)(7) inapplicable to Iraq was a valid exercise of his EWSAA authority.

A divided D.C. Circuit panel rejected that argument. Even though EWSAA § 1503 expressly authorized the President to make inapplicable with respect to Iraq "*any* * * * provision of law that applies to countries that have supported terrorism," EWSAA § 1503 (emphasis added), and even though Section 1605(a)(7) was a provision of law that applied *only* to countries that have supported terrorism, the panel interpreted Section 1503 narrowly to include only "legal restrictions on assistance and funding for the new Iraqi Government." *Acree*, 370 F.3d at 57.

But even the majority found that this was an "exceedingly close question," *id.* at 51, and its analysis was refuted by then-Judge Roberts, who disagreed on this point. As he explained, the EWSAA language "'[a]ny other provision' should be read to mean 'any other provision,' not, as the majority would have it, 'provisions that present obstacles to assistance and funding for the new Iraqi Government.'" *Id.* at 60 (Roberts, J., concurring) (citation omitted).

The panel nevertheless vacated the entire judgment against Iraq, holding that "generic common law" may not furnish a cause of action in a Section 1605(a)(7) case and that plaintiffs failed to "identify a particular cause of action arising out of a specific source of law." *Id.* at 59. Because the judgment was vacated, there was no opportunity for the United States to seek *en banc* or Supreme Court review of the panel majority's jurisdictional holding on the EWSAA issue.

In 2005, Iraq retained counsel in *Beaty* and moved to dismiss. Plaintiffs moved for partial summary judgment on liability. On March 20, 2007, the trial court (the Hon. John D. Bates) granted in part and denied in part both motions. The court first determined that, under *Acree*, Iraq was not entitled to sovereign immunity as a result of the President's EWSAA Determination. JA236-37. Judge Bates stated, however, that Judge Roberts' opinion in *Acree* has "considerable force" and that the court "would be inclined to adopt that position if free to do so." *Id.* The court then addressed, in the bulk of its opinion, Iraq's alternative grounds for dismissal, including arguments under the political question, foreign affairs preemption, and Act of State doctrines.

Because the denial of sovereign immunity was immediately appealable as a collateral order, *see, e.g.*, *Permanent Mission of India to the United Nations* v. *City of New York*, 127 S. Ct. 2352, 2355 (2007); *Kilburn* v. *Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1126 (D.C. Cir. 2004), Iraq timely noticed an appeal from the District Court's March 20 order.[4]

The plaintiffs moved for summary affirmance on the basis of *Acree*. Iraq filed a petition for initial hearing *en banc*, urging the D.C. Circuit to

[4] That decision primarily addressed Iraq's alternative grounds for dismissal. Because these issues (unlike sovereign immunity) may not otherwise have been immediately appealable, Judge Bates certified that order for interlocutory appeal under 28 U.S.C. § 1292(b), and Iraq petitioned the D.C. Circuit for acceptance of that appeal. The D.C. Circuit has held that petition in abeyance pending this Court's decision in this case. *See* Order of Sept. 24, 2008, *In re Republic of Iraq*, No. 07-8004 (D.C. Cir.). If this Court holds that Iraq's sovereign immunity has been restored, that petition would be moot.

reconsider and overrule *Acree*. The United States filed an amicus brief urging that the petition be granted. The D.C. Circuit denied the petition, with Judges Kavanaugh and Brown dissenting. JA311.

On November 21, 2007, a D.C. Circuit motions panel granted plaintiffs' motion for summary affirmance. Citing only *Acree*, the panel ruled that "[t]he district court correctly held that the Republic of Iraq's sovereign immunity, waived or abrogated under 28 U.S.C. § 1605(a)(7), has not been restored under the [EWSAA] and Presidential Determination 2003-23." JA313.

E. The *Simon/Seyam* Proceedings And The NDAA.

In 2005, Iraq retained counsel in *Simon*, *Seyam*, and *Vine*, and moved to dismiss. On September 6, 2006, after it had consolidated the cases, the trial court (the Hon. Henry H. Kennedy, Jr.) ruled on the motions. The court first concluded that it possessed subject matter jurisdiction under former Section 1605(a)(7). JA200. *See also* Mem. and Order, *Vine* v. *Republic of Iraq*, No. 01-CV-2674 (D.D.C. July 20, 2004) (holding, under *Acree*, that Iraq's immunity was not restored). The court then rejected Iraq's contention that the plaintiffs' claims were non-justiciable. JA200-02. The court also held that the *Vine* plaintiffs' claims were not time-barred, and denied Iraq's motion in its entirety as to those claims. JA210-11. The court, however, dismissed the *Simon* and *Seyam* claims as barred by the ten-year statute of limitations. JA211. Those plaintiffs appealed the dismissals.

On December 14, 2007—after the *Simon*/*Seyam* appeal had been briefed and argued in the D.C.

Circuit—Congress passed the initial version of the NDAA. The main purpose of that bill was to authorize funding for the military. However, NDAA § 1083 ("Section 1083") sought to amend the FSIA to provide for new jurisdictional, liability, attachment, and other provisions for litigation against current and former state sponsors of terrorism. One provision sought to overrule the District Court's statute-of-limitations decision in *Simon / Seyam*. *See* NDAA, § 1083(a)(1) (enacting 28 U.S.C. § 1605(b)). Another purported to state the current Congress' view on the intent of the earlier Congress that had enacted the EWSAA in 2003. *See* NDAA, § 1083(c)(4). Section 1083 had originally been introduced as an amendment on the Senate floor, and there were no hearings or substantive debate on it. In particular, Section 1083(c)(4) was an entirely new provision inserted in conference committee with no debate or even identification of its sponsor. *Compare* H.R. Rep. No. 110-477, at 338-344 (2007) *with* 153 Cong. Rec. S12631-32 (Oct. 3, 2007).

On December 28, 2007, the President announced his veto of the entire NDAA solely because of the effect of Section 1083 as it would have applied to litigation against Iraq. In his memorandum of disapproval returning the bill to the House of Representatives, the President explained that Section 1083, if allowed to become law, "would undermine the foreign policy and commercial interests of the United States." *Memorandum of Disapproval*, 43 Weekly Comp. Pres. Doc. 1641 (Dec. 28, 2007) (JA411). The President stated his view that the intervening adjournment of Congress had prevented the return of the bill, thereby effectuating a "pocket veto" within the meaning of Article I, Section 7 of the

Constitution. JA414. However, in addition to taking that position, the President announced that "I am also sending H.R. 1585 to the Clerk of the House of Representatives, along with this memorandum setting forth my objections, to avoid unnecessary litigation about the non-enactment of the bill that results from my withholding approval and to leave no doubt that the bill is being vetoed." *Id.*

Following the veto, Congress swiftly enacted a new NDAA. The only significant difference between the new NDAA and the vetoed bill was in Section 1083. As enacted, Section 1083 expressly repeals former 28 U.S.C. § 1605(a)(7), the only asserted basis for jurisdiction in these cases. *See* NDAA, § 1083(b)(1)(A)(iii) ("Section 1605 of title 28, United States Code, is amended * * * in subsection (a) * * * by striking paragraph (7)"). In its place, Congress enacted a new jurisdictional exception to immunity for state sponsors of terrorism, now codified at 28 U.S.C. § 1605A(a). *See* NDAA, § 1083(a).

Insofar as it provides a basis for jurisdiction, Section 1605A(a) is largely consonant with former Section 1605(a)(7). But as a result of the veto, the enacted version of the NDAA contained a new provision, Section 1083(d)(1), authorizing the President to "waive any provision of [Section 1083] with respect to Iraq, insofar as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof." NDAA, § 1083(d)(1).

To issue such a waiver, the President must determine that it is "in the national security interest of the United States," that it would "promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq," and that "Iraq continues to be a reliable ally of the

United States and partner in combating acts of international terrorism." *Id.* Congress provided that the waiver will apply to pre-enactment conduct and regardless of the extent to which it affects pending cases. *Id.* § 1083(d)(2). Section 1083(d)(4) also states the "sense of Congress" that the President "should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime" that "cannot be addressed in courts in the United States due to the exercise of the waiver authority." *Id.* § 1083(d)(4).

On January 28, 2008, the President signed the NDAA into law and then exercised his authority to waive "all provisions of section 1083 of the Act with respect to Iraq and any agency or instrumentality thereof." Presidential Determination No. 2008-9, 73 Fed. Reg. 6571 (2008) (JA422). This waiver necessarily included the entirety of 28 U.S.C. § 1605A, which was added by Section 1083(a).

The President made all the determinations required by Section 1083(d)(1). He also determined that Section 1083 may adversely affect Iraq "by exposing Iraq or its agencies or instrumentalities to liability in United States courts and by entangling their assets in litigation." *Id.* The President concluded that "[s]uch burdens would undermine the national security and foreign policy interests of the United States, including by weakening the ability of the democratically-elected government of Iraq to use Iraqi funds to promote political and economic progress and further develop its security forces." JA425.

These burdens, in the President's view, included "a potentially devastating impact on Iraq's ability to use Iraqi funds to expand and equip the Iraqi Secur-

ity Forces, which would have serious implications for U.S. troops in the field * * * and would harm anti-terrorism and counter-insurgency efforts." JA426. The President also determined that applying Section 1083 to Iraq "*will hurt the interests of the United States by unacceptably interfering with political and economic progress in Iraq that is critically important to bringing U.S. troops home*," and "would redirect financial resources from the continued reconstruction of Iraq and would harm Iraq's stability, contrary to the interests of the United States." JA426-27 (emphasis added). He further concluded that "[t]he economic security and successful reconstruction of Iraq continue to be top national security priorities of the United States" and that Section 1083 "threatens those key priorities." JA422.

Following the waiver, the D.C. Circuit *sua sponte* directed the *Simon/Seyam* parties to submit simultaneous 15-page briefs addressing the jurisdictional effect, if any, of the NDAA and the waiver. JA315. Iraq contended that these actions confirmed the lack of subject matter jurisdiction because the NDAA (1) repealed the jurisdictional basis for the cases—former Section 1605(a)(7)—and (2) replaced it with a new jurisdictional provision—28 U.S.C. § 1605A(a)—application of which the President waived as to Iraq pursuant to express statutory authority.[5] The court allowed no responsive briefing, and held no argument on this issue.

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[5] Iraq also alternatively raised the EWSAA issue, as it had in its earlier brief. *See* Br. of Appellee in Response to Court's Order of Feb. 4, 2008 at 7 n.3, *Simon* v. *Republic of Iraq*, No. 06-7175 (D.C. Cir. filed Mar. 14, 2008); Br. of Defendants-Appellees at 51-53 (D.C. Cir. filed June 18, 2007).

On June 24, 2008, the D.C. Circuit decided the *Simon / Seyam* appeal. It held that subject matter jurisdiction existed, because former Section 1605(a)(7), even though repealed and replaced, still governs pending cases against Iraq, JA320-30, and because the binding *Acree* decision had held that the President did not validly waive that provision. JA335 n.*. The court then reversed the statute-of-limitations dismissals, and rejected Iraq's contention that adjudication of plaintiffs' claims would present non-justiciable political questions. JA330-37.

This Court has granted certiorari to review the D.C. Circuit's judgments in *Beaty* and *Simon / Seyam*. The petitions present the same question: whether Iraq's sovereign immunity has been restored in cases predicated on former Section 1605(a)(7). That question should be answered in the affirmative, and the judgments below reversed.

SUMMARY OF THE ARGUMENT

Under the governing statute, 28 U.S.C. § 1330(a), continuing subject matter jurisdiction exists in these cases only if Iraq is subject to an applicable statutory exception to its foreign sovereign immunity. The only asserted or arguable basis for abrogation of Iraq's immunity, and thus for subject matter jurisdiction, in these cases was former Section 1605(a)(7). But that statute is inapplicable for two reasons.

First, Section 1503 of the EWSAA authorized the President to "make inapplicable with respect to Iraq * * * *any* * * * provision of law that applies to countries that have supported terrorism." EWSAA § 1503 (emphasis added). Implementing important foreign policy judgments, the President exercised the full extent of that authority, which included making

former Section 1605(a)(7) inapplicable to Iraq. The plain language of the EWSAA easily encompasses former Section 1605(a)(7), which was a sanction that applied *only* to countries that supported terrorism. Congress authorized the President to make "any" such laws inapplicable to Iraq, and this Court has repeatedly held that the broad term "any" means what it says.

Contrary to the lower court's holding, there is no basis for limiting EWSAA § 1503 to encompass only a narrow subset of laws. Section 1605(a)(7) was one of many sanctions levied against state sponsors of terrorism, and Congress authorized the President to make all of them, without limitation, inapplicable to Iraq. In construing garden-variety statutes, this Court has consistently upheld plain statutory language when Congress used nearly identical wording to the broad provision at issue here. The case for enforcing that plain language is even stronger here, given that the statute addresses foreign relations, where deference to, and broad grants of, Presidential authority are the norm. Nor does the temporal scope of former Section 1605(a)(7) support a limitation on the President's EWSAA authority. That authority plainly allowed him to make Section 1605(a)(7) immediately and permanently inapplicable to Iraq, and reflected the dramatic shift in U.S. foreign policy from penalizing to supporting Iraq.

Second, regardless of whether the President made former Section 1605(a)(7) inapplicable in 2003, the enactment of the NDAA in 2008 accomplished the same result. In that statute, Congress expressly *repealed* Section 1605(a)(7) and replaced it with a new jurisdictional exception to immunity—Section 1605A—that the President promptly waived as to

Iraq pursuant to express statutory authority. Accordingly, for this reason as well, there is no longer any extant statutory exception to immunity applicable to these cases and no jurisdiction under the plain language of 28 U.S.C. § 1330(a).

The repeal of Section 1605(a)(7) is subject to the usual rule that jurisdictional repeals apply to pending cases—a rule that has particular application to foreign sovereign immunity, which has always reflected current relations among nations. Congress did not merely repeal the statute. Rather, it simultaneously replaced Section 1605(a)(7) with a new provision that encompasses all pending claims—subject only to re-filing rules and the waiver authority as to Iraq, which Congress expressly made applicable to pending cases. And nothing in the NDAA expresses any intent to qualify the unqualified repeal of Section 1605(a)(7). To the contrary, every provision relied on by the court below is fully consistent with Congress's expressed intent to have new Section 1605A—subject to the President's waiver authority as to Iraq—be the sole basis for jurisdiction against foreign sovereigns based on a state-sponsor-of-terrorism designation.

Finally, the legal issues in this case cannot be divorced from their foreign policy context. Foreign sovereign immunity has always reflected *current* relations between nations, and rests on fundamental notions of reciprocity and comity. Acting with statutory authority, the President twice determined that, in light of the overthrow of the prior regime, Iraq should no longer be treated as an outlaw nation but instead should be accorded the same sovereignty in U.S. courts as other U.S. allies. Those determinations effectuate U.S. foreign policy of supporting,

rather than penalizing, the new government of Iraq, which is now a U.S. ally in the fight against terrorism rather than a sponsor of it. They are also critical to the relations between the nations, since how Iraq is treated in U.S. courts bears on how the United States might be treated in Iraqi courts.

The clear mandates of the governing statutes should not be overridden so as to threaten the Executive's ability to implement these crucial foreign policy and diplomatic objectives. These claims should be addressed as claims against friendly allies based on the actions of hostile former regimes have always been addressed in the past—through diplomatic channels rather than by subjecting sovereign allied nations to coercive lawsuits in each other's courts.

Accordingly, whether this case is analyzed under the EWSAA or the NDAA, the result is the same: the question presented should be answered in the affirmative and the judgments below reversed with instructions to dismiss the complaints for lack of subject matter jurisdiction.

ARGUMENT

In pertinent part, the FSIA confers federal jurisdiction over actions against a foreign state "as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity * * * under sections 1605–1607 of this title * * *." 28 U.S.C. § 1330(a). Thus, the FSIA is "the sole basis for obtaining jurisdiction over a foreign state" and "subject-matter jurisdiction in any [FSIA] action depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35, 439 (1989).

The only asserted or arguable basis for abrogating Iraq's sovereign immunity in these cases—and thus statutory subject matter jurisdiction—was former Section 1605(a)(7). JA162, JA172, JA181. The President, however, made former Section 1605(a)(7) inapplicable to Iraq pursuant to authority the EWSAA expressly granted him, and, in any event, Congress later repealed that statute in the NDAA. "Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). Accordingly, because there is no longer any basis for jurisdiction in these cases, they must be dismissed.

I. THE PRESIDENT'S EWSAA DETERMINATION MADE FORMER SECTION 1605(A)(7) INAPPLICABLE TO IRAQ.

A. The Plain Language Of The EWSAA Authorized The President To Make Section 1605(a)(7) Inapplicable To Iraq.

"[I]n any case of statutory construction, [the] analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (citation omitted). "A statute can be unambiguous without addressing every interpretive theory offered by a party. It need only be 'plain to anyone reading the Act' that the statute encompasses the conduct at issue." *Salinas* v. *United States*, 522 U.S. 52, 60 (1997) (citation omitted).

EWSAA § 1503 states that "the President may make inapplicable with respect to Iraq section 620A

of the Foreign Assistance Act of 1961 *or any other provision of law* that applies to countries that have supported terrorism." EWSAA § 1503 (emphasis added). In 2003, the President exercised the full extent of this authority which, as he confirmed, included making former Section 1605(a)(7) inapplicable to Iraq. JA396, JA398, JA402. That should be the end of these cases. The plain text of the statute unambiguously authorized the President to make former Section 1605(a)(7) inapplicable to Iraq, and he did so. Congress used the expansive word "any" to modify "other provision of law that applies to countries that have supported terrorism." EWSAA § 1503. That plainly covers former Section 1605(a)(7), which applied *only* to such countries. *See* 28 U.S.C. § 1605(a)(7)(A) (2000) (repealed) (immunity waived unless "the foreign state was not designated as a state sponsor of terrorism" at the time of, or as a result of, the underlying acts).

On several occasions, this Court has construed similar statutory language and determined that it is unambiguously broad. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)). Thus, in *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588 (1980), the Court construed a jurisdictional grant providing for review of certain enumerated agency final actions "or any other final action of the Administrator under this Act." One party claimed that "any other final action" should be construed narrowly to mean "only those similar to the actions under the specifically enumerated provisions that precede that catchall phrase." *Id.* at 587. The Court

rejected that claim because the phrase "any other final action" was "expansive" and "offer[ed] no indication whatever that Congress intended the limiting construction * * *." *Id.* at 589.

Recently, this Court reached the same conclusion in *Ali* v. *Fed. Bureau of Prisons*, 128 S. Ct. 831 (2008), which involved a statute that exempted from a waiver of sovereign immunity claims involving, *inter alia*, detention of property "by any officer of customs or excise *or any other* law enforcement officer." 28 U.S.C. § 2680(c) (emphasis added). Noting that the "[t]he phrase '*any* other law enforcement officer' suggests a broad meaning," *Ali*, 128 S. Ct. at 835 (emphasis in original), the Court rejected the argument that the preceding phrase narrowed the statute's scope. *Id.* at 839. The *ejusdem generis* doctrine—which interprets general terms in accord with preceding specific ones—did not apply because "[t]he phrase [was] disjunctive, with one specific and one general category." *Id.* Without more listed items to compare it to, "no relevant common attribute immediately appear[ed] from the phrase 'officer of customs or excise.'" *Id.* Nor could the *noscitur a sociis* doctrine—which interprets a word by the company it keeps—create an ambiguity where none existed, because "nothing in the overall statutory context suggest[ed] that customs and excise officers were the exclusive focus of the provision." *Id.* at 840.

The case for giving the broad term "any" its plain meaning is even stronger here, given that nothing in the EWSAA narrows Section 1503's broad grant of foreign-policy authority to the President. Nevertheless, in *Acree*, the D.C. Circuit relied heavily on the *ejusdem* and *noscitur* canons to narrowly interpret

the words "*any* other provision of law" to mean only those provisions that "call for economic sanctions and prohibit grants of assistance to state sponsors of terrorism." 370 F.3d at 54. But as in *Harrison* and *Ali*, those canons only apply if the surrounding words provide "a common feature to extrapolate." *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 380 (2006). The words surrounding Section 1503's grant of authority give no common feature from which to extrapolate a restriction, except the requirement that the laws made inapplicable be ones that "appl[y] to countries that have supported terrorism." That perfectly describes former Section 1605(a)(7).[6]

The preceding phrase in Section 1503—which refers to section 620A of the Foreign Assistance Act of 1961 ("FAA")—does not provide a common limiting feature. It is not a list from which a common characteristic can be identified, but rather a single example of a law the President may make inapplicable. *See Ali*, 128 S. Ct. at 839 ("[t]he absence of a list of specific items undercuts the inference embodied in *ejusdem generis* that Congress remained focused on the common attribute when it used the catchall phrase"). And one cannot "assume that pairing a broad statutory term with a narrow one shrinks the broad one." *S.D. Warren*, 547 U.S. at

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[6] It also describes many other sanctions against state sponsors of terrorism that do not meet the D.C. Circuit's narrow construction of the EWSAA. *See, e.g.*, 8 U.S.C. § 1735 (restricting visas); 15 U.S.C. § 57b-2(b)(6)(D) (restricting cooperation with foreign law enforcement); 15 U.S.C. § 7410(b) (restricting grants and fellowships to individual Iraqis); 22 U.S.C. § 4305(d) (restricting foreign mission property acquisition); 26 U.S.C. 901(j)(2)(A)(iv) (denial of foreign tax credits).

379. "[G]iving one example does not convert express inclusion into restrictive equation." *Id.*

Nor do the surrounding provisos turn Section 1503's broad grant of authority into a narrow one. Section 1503 begins by stating that "[t]he President may suspend the application of any provision of the Iraq Sanctions Act of 1990" and follows with eight disjointed provisos, the second of which is at issue here. But the President's authority to make laws inapplicable to Iraq is not narrowed by its appearance in a proviso. Provisos sometimes refer back to the preceding clause, but "it is also possible to use a proviso to state a general, independent rule." *Alaska* v. *United States*, 545 U.S. 75, 106 (2005). *See also Am. Express Co.* v. *United States*, 212 U.S. 522, 534 (1909) ("a proviso has not infrequently been the means of introducing into a law independent legislation").

The proviso at issue here is such an independent rule. Far from tying the President's authority to the Iraq Sanctions Act ("ISA"), the second proviso refers to a *different* law—FAA § 620A—as well as "any" other law applying to state sponsors of terrorism. All four of the other substantive provisos in EWSAA § 1503 are similarly divorced from the President's authority to suspend the ISA.[7] The fourth expressly declares FAA § 307 inapplicable to Iraq, and the fifth ends restrictions on U.S. voting in international bodies for resolutions or programs providing assistance to Iraq. Like the second proviso, neither is linked to the ISA. Indeed, FAA § 307 was not

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[7] Section 1503 has eight provisos, but the sixth, seventh, and eighth relate only to reporting requirements and the expiration of the President's authorities.

enacted until after the ISA. *See* Foreign Relations Authorization Act, Fiscal Year 1994-95, Pub. L. No. 103-236, § 431(a)(1), 108 Stat. 459 (1994). And while the first and third provisos limit the President's powers under "this section" (*i.e.*, EWSAA § 1503) neither is specifically tied to the section's first clause relating to the ISA.

According to the *Acree* majority, 370 F.3d at 54, the second proviso must refer *sub silentio* to Section 586F(c) of the ISA, which broadly mandated enforcement against Iraq of five enumerated sanctions "and all other provisions of law that impose sanctions against a country which has repeatedly provided support for acts of international terrorism." ISA § 586F(c), 104 Stat. 2051. But the EWSAA does not refer to ISA § 586F(c) or contain the same enumerated list of sanctions. And the operative language of the two provisions is different. Whereas ISA § 586F(c) refers broadly to all other "sanctions" laws, EWSAA § 1503 refers to all other laws that "apply" to state sponsors of terrorism. Thus, while former Section 1605(a)(7)—which exposed Iraq to lawsuits and judgments that cannot be brought or imposed against other nations—was a form of sanction, the language of EWSAA § 1503 is even broader than that of ISA § 586F(c).

In any event, when the ISA expressly mandated enforcement against Iraq of "*all* other provisions of law" imposing sanctions on state sponsors of terrorism, there is no basis to conclude that Congress intended to exempt some of those provisions. The obvious purpose of ISA § 586F was to codify the President's earlier determination that Iraq was a state sponsor of terrorism, *see* 55 Fed. Reg. 37,793 (1990), and apply to Iraq all laws that attach to that

designation. Such laws necessarily included anything triggered by such a designation, like former Section 1605(a)(7). Thus, even if the President's EWSAA authority were tied to the broad set of laws referenced in ISA § 586F(c)—and it was not—former Section 1605(a)(7) is included.

When Congress wants to specify a subset of the laws applying to state sponsors of terrorism, it knows how to do so. Just two months before enacting the EWSAA, Congress enacted the Consolidated Appropriations Resolution of 2003. That law provided that exemptions from certain restrictions on assistance to nongovernmental organizations would not apply "with respect to section 620A of the Foreign Assistance Act of 1961 or any *comparable provision of law prohibiting assistance* to countries that support international terrorism." Pub. L. No. 108-7, § 537(c)(1), 117 Stat. 196 (2003) (emphasis added). Thus, "Congress knows how to use more limited language along the lines of the [*Acree*] majority's construction when it wants to." *Acree*, 370 F.3d at 60 (Roberts, J., concurring).

Federal courts "are not at liberty to rewrite [a] statute to reflect a meaning [they] deem more desirable. Instead, [they] must give effect to the text Congress enacted." *Ali*, 128 S. Ct. at 841. *See also McNeil* v. *United States*, 508 U.S. 106, 111 (1993). Yet that is what the D.C. Circuit did with the EWSAA. It effectively rewrote the broad language "*any* other provision of law" to say "those provisions of law that constitute legal restrictions on assistance to and trade with Iraq." *Acree*, 370 F.3d at 56. That interpretation was manifestly erroneous.

B. The EWSAA's History And Context Confirm Its Plain Language.

Because the statute is unambiguous, there is no cause to look to legislative history. *Gonzales*, 520 U.S at 6 ("[g]iven [a] straightforward statutory command, there is no reason to resort to legislative history"). The EWSAA's history, however, confirms that the statute's scope was intentionally made broad.

In proposing the EWSAA, the White House initially asked for the power to make inapplicable, as to Iraq, FAA § 620A "or other provision of law that applies to countries that have supported terrorism." 08-539 Opp. Cert. 22a. The Senate bill adopted that request word-for-word. S. 762, § 503, 108th Cong. (2003). But the House bill authorized the President to make inapplicable "*any* other provision of law that applies to countries that have supported terrorism." H.R. 1559, § 1402, 108th Cong. (2003) (emphasis added). This version became law. Thus, by inserting the word "any," Congress deliberately expressed its intent to give the provision an unambiguously "expansive meaning." *Gonzales*, 520 U.S. at 5.

The D.C. Circuit concluded that the legislative history of the EWSAA is "sparse" and "not conclusive." *Acree*, 370 F.3d at 55, 56. It then relied on the *absence* of any history specifically referring to former Section 1605(a)(7) or federal court jurisdiction to support its narrowing of Section 1503's broad grant of authority. *Id.* at 56. The absence of such legislative history is no basis to override the broad language that Congress actually used. *See Brogan* v. *United States*, 522 U.S. 398, 403 (1998) ("it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy"); *Pa. Dep't of Corr.* v.

Yeskey, 524 U.S. 206, 212 (1998) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.") (citations and quotations omitted).

The breadth of Section 1503 is unsurprising given that the statute implicates foreign policy, where "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act." *Dames & Moore* v. *Regan*, 453 U.S. 654, 678 (1981). As this Court has held,

> [p]ractically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs.

United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Because the President "has the better opportunity of knowing the conditions which prevail in foreign countries, * * * especially * * * in time of war," the Court has acknowledged the "unwisdom of requiring Congress in this field * * * to lay down narrowly definite standards by which the President is to be governed." *Id.* at 320-22.

In the EWSAA, Congress delegated to the President the delicate foreign policy judgments regarding whether and when a new government of Iraq would be freed from the sanctions imposed on its predecessor regime. Following the regime's ouster,

the President made the determination—expressly authorized by the EWSAA—that Iraq would henceforth be treated like other democratic allies, including in the restoration of its fundamental sovereign immunity. "[T]his Court consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Verlinden*, 461 U.S. at 486. Even the *Acree* majority found the President's interpretation of Section 1503 "plausible" because "§ 1605(a)(7) arguably poses a threat of a sort to American reconstruction efforts in Iraq." 370 F.3d at 57. Thus, even if EWSAA § 1503 were ambiguous—and it is not—there would be no basis to countermand the President's reasonable foreign-policy determination. *See Dep't of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988) ("[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.").

Indeed, the President has independent constitutional authority—even *without* express statutory authorization—to compromise the claims of U.S. nationals to further foreign policy interests. *See Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 415 (2003) ("'[t]hat the President's control of foreign relations includes the settlement of claims is indisputable'") (citation omitted); *Dames & Moore*, 453 U.S. at 679-80 (President possesses Article II authority to settle or compromise pending claims in exercise of foreign policy). Since the President could have wholly eliminated these claims based on his own foreign affairs power, the EWSAA's express, broad statutory authorization should not be construed to have denied him

the lesser power to make an exception to sovereign immunity inapplicable while still preserving claims for diplomatic negotiation.

Contrary to the *Acree* majority's reasoning, 370 F.3d at 56, the plain language of the EWSAA cannot be overridden based on "comparison of the temporal scope of 28 U.S.C. § 1605(a)(7) with that of § 1503." Section 1503's temporal scope is clear. Congress authorized the President to "make inapplicable" as to Iraq—immediately and permanently upon his determination—all laws applying to state sponsors of terrorism. Because statutory subject matter jurisdiction must exist at all stages of a case, *see McCardle*, 74 U.S. (7 Wall.) at 514, the inapplicability of Section 1605(a)(7) necessarily meant that there was no longer any jurisdictional basis for these cases. Any other conclusion would mean that Section 1605(a)(7) is still "applicable" to Iraq, which would be contrary to the determination that Congress authorized the President to make.

The D.C. Circuit wrongly thought this result "perplexing" because Section 1605(a)(7)'s abrogation of immunity continued, as to other nations, for claims based on prior acts even if the terrorism-sponsor designation was later removed. *Acree*, 370 F.3d at 56. The EWSAA, and the President's determination, addressed a situation not expressly contemplated when Section 1605(a)(7) was enacted: the overthrow of a terrorism-sponsoring regime by U.S. military force and the establishment of a new, democratic, and allied government. Almost overnight, Iraq went from being an outlaw sponsor of terrorism to a crucial U.S. ally in the fight against that terrorism. Recognizing that new reality, Congress "made an *ad hoc* decision to strike a

different balance in favor of the new government of Iraq. The whole point of Section 1503 was to change existing rules to respond to new realities; it is not a compelling argument against a construction of the section to object that it would do just that." *Id.* at 61 (Roberts, J., concurring).

The foreign policy as to Iraq embodied in Section 1503 thus differs from U.S. policy as to other former state sponsors of terrorism. For example, although Libya has been removed from that list, it is far from a friendly U.S. ally. Equally important, the government that sponsored the terrorism—the Khaddafi regime—is still in power. Thus, when the Executive de-listed Libya, it made clear that this action was subject to "a confirmation from Libya" that Libya would have to respond to the legal cases against it. 71 Fed. Reg. 31,909 (2006). *See also* Libyan Claims Resolution Act, Pub. L. No. 110-301, 122 Stat. 3000 (2008); 73 Fed. Reg. 63,540 (2008) (rescinding North Korea's designation while hostile regime still in power). By contrast, these cases against Iraq seek to penalize a new, democratic, and allied government that the United States is actively supporting.

Nor is the restoration of Iraq's sovereign immunity "bizarre" in light of the EWSAA's sunset provision. *Acree*, 370 F.3d at 56-57. The D.C. Circuit misread that provision, which was never briefed in *Acree*. The provision states that the "*authorities* contained in this section shall expire" if not renewed. EWSAA § 1503 (emphasis added). *See* Pub. L. No. 108-106, § 2204(2), 117 Stat. 1230 (2003) (extending authorities until September 30, 2005). It did not provide that the *effect* of the President's actions would expire where, as here, the actions were taken while the statutory authority was in effect.

Such an interpretation would be nonsensical. For example, Section 1503 authorized the President to suspend the ISA, which legislatively designated Iraq as a state sponsor of terrorism and imposed its own sanctions. *See* ISA, §§ 586C, 586F(c). If the effect of that suspension expired with the President's EWSAA's authorities, Iraq would have been re-subjected to onerous statutory sanctions even though its terrorism-sponsor designation was administratively lifted. Exercising valid and extant authority, the President permanently made former Section 1605(a)(7) inapplicable to Iraq. *See also* H.R. Conf. Rep. No. 108-337 at 59 (2003) (noting, in connection with extension of EWSAA authorities, that Presidential Determination 2003-23 had made laws "permanently inapplicable to Iraq").

But even under the *Acree* majority's flawed interpretation that Section 1503 covers only laws "that impose economic sanctions on Iraq or that present legal obstacles to the provision of assistance to the Iraqi Government," 370 F.3d at 55, the President's determination still restored Iraq's sovereign immunity. Former Section 1605(a)(7), which authorized costly lawsuits and potentially massive judgments against Iraq based on its status as a terrorism sponsor, was in fact an "economic sanction[] on Iraq," *id.*, and the President determined in his foreign-policy judgment that the statute presented legal obstacles to assisting the Iraqi Government, *see supra* at 6-8.

C. NDAA Section 1083(c)(4) Does Not Affect The President's EWSAA Determination.

NDAA § 1083(c)(4)—an eleventh-hour conference amendment attached without debate to the pre-veto bill—purports to state the intent of the earlier

Congress that enacted the EWSAA. *See* NDAA § 1083(c)(4) ("[n]othing in section 1503 of [the EWSAA] has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States"). That provision has no effect on this case for two reasons.

First, Section 1083(c)(4) is an ineffective, after-the-fact effort to manufacture "history" for an expired law. Section 1083(c)(4) is not itself a substantive provision: it does not authorize or prohibit anything, it does not amend or reenact the EWSAA (which had long since expired) or any other law, and it does not purport to rescind the determination the President had made years before. As such, it cannot displace the traditional canons of statutory interpretation in construing the earlier EWSAA authority under which the President had previously acted. An attempt by later legislators to ascribe intent to a previous, differently-constituted Congress cannot override the plain language of the statute as an expression of the intent of the Congress that passed it.

"[P]ostenactment views 'form a hazardous basis for inferring the intent' behind a statute; instead, Congress' intent is 'best determined by [looking to] the statutory language that it chooses.'" *United States* v. *Monsanto*, 491 U.S. 600, 610 (1989) (citations omitted). This is true, moreover, even where the attempt at subsequent history is codified. *See Rainwater* v. *United States*, 356 U.S. 590, 593 (1958) ("At most, the 1918 amendment is merely an expression of how the 1918 Congress interpreted a statute passed by another Congress more than a half century before. Under these circumstances such interpretation has very little, if any, significance.");

Mackey v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839-40 (1988) ("the opinion of this later Congress as to the meaning of a law enacted 10 years earlier does not control the issue").[8]

The oxymoronic nature of "subsequent legislative history" is particularly evident here, where the President properly and effectively exercised his EWSAA authority while it was in effect, but that authority expired long before the NDAA. *See Sullivan* v. *Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously * * *."). In these circumstances, any attempt by later legislators to hypothesize the intent of the earlier authorization is of no moment. Where a legislature purports in a new law to declare the construction of prior law as applied to past events,

> [c]ourts will treat such laws with all the respect that is due to them as an expression of the opinion of individual members of the legislature as to what the rule of law previously was. But beyond that they can have no binding effect; and if the judge is satisfied the legislative construction is wrong, he is bound to disregard it.

Koshkonong v. *Burton*, 104 U.S. (14 Otto) 668, 678 (1881). The President's exercise of his statutory authority should be judged based on the unambiguous words of the statute before him when

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[8] *See also South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 354-55 (1998); *Haynes* v. *United States*, 390 U.S. 85, 87 n.4 (1968) ("[t]he view of a subsequent Congress of course provide[s] no controlling basis from which to infer the purposes of an earlier Congress").

he acted, not by an after-the-fact, unsuccessful attempt to manufacture "history."

Second, even if Section 1083(c)(4) could otherwise have had an effect on Iraq's rights in this case, its application was waived by the President under authority expressly granted him in the NDAA. The President did not acquiesce in this clumsy attempt to cast doubt on his prior exercise of foreign policy authority. Rather, he vetoed the original bill and refused to sign any replacement until he was given the authority to waive any and all provisions of Section 1083—necessarily including Section 1083(c)(4)—to the extent they may affect Iraq. *See* NDAA § 1083(d). The President did just that, waiving *all* then-operative provisions of Section 1083 as to Iraq. For this reason as well, Section 1083(c)(4) has no effect on Iraq in this case.

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For these reasons, the President properly exercised his EWSAA authority to make former Section 1605(a)(7) inapplicable to Iraq. As a result, there is no continuing subject matter jurisdiction in these cases.

II. THE NDAA'S REPEAL OF FORMER SECTION 1605(A)(7), AND THE PRESIDENT'S WAIVER OF ITS REPLACEMENT, HAVE ELIMINATED ANY CLAIMED BASIS FOR SUBJECT MATTER JURISDICTION.

Because the President's EWSAA determination restored Iraq's sovereign immunity in 2003, there is no need to consider whether the enactment of the NDAA and subsequent waiver accomplished the same result in 2008. Nevertheless, in the event the

EWSAA determination is not dispositive, the NDAA and waiver are an independent reason to answer the question presented in the affirmative and reverse the judgments below. Regardless of whether the President effectively made Section 1605(a)(7) inapplicable to Iraq in 2003, the NDAA expressly *repealed* that statute and the President then waived its replacement as to Iraq. The result is the same: there is no extant exception to sovereign immunity applicable to these cases, and therefore no basis for continuing subject matter jurisdiction.

A. There Is No Jurisdiction Under The Plain Language Of The Governing Statutes.

Under 28 U.S.C. § 1330(a) ("Section 1330(a)"), FSIA jurisdiction exists only as to claims "with respect to which the foreign state is not entitled to immunity * * * *under sections 1605–1607 of this title* * * *." 28 U.S.C. § 1330(a) (emphasis added). Thus, jurisdiction depends on whether there is *currently* an applicable exception to immunity in sections 1605-1607 of title 28 of the U.S. Code. Section 1605(a)(7) has been repealed and no longer exists in the U.S. Code.[9] And its replacement, Section 1605A, has been waived as to Iraq. Accordingly, under the plain language of Section 1330(a), there is no longer any statutory subject matter jurisdiction in these cases. *See Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("[f]ederal courts are courts of limited jurisdiction" and "possess only that power

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[9] *See* NDAA, § 1083(b)(1)(A)(iii) ("Section 1605 of title 28, United States Code, is amended * * * in subsection (a) * * * by striking paragraph (7)"); *see also House Legislative Counsel's Manual on Drafting Style*, HLC 104-1, 104th Cong., 1st Sess. § 334, at 46 (1995) ("a repeal and a strike carry the same legal significance").

authorized by Constitution and statute"); *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("Federal courts * * * have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto").

In *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), this Court held that newly enacted exceptions to immunity in the FSIA apply to cases based on prior acts. The Court relied on the principle that "such immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some *present* 'protection from the inconvenience of suit as a gesture of comity.'" *Id.* at 696 (emphasis in original; citation omitted). Applying that principle, the Court "defer[red] to the most recent * * * decision" of the political branches on immunity. *Id.* FSIA jurisdiction thus depends on currently-codified exceptions to immunity, which no longer include former Section 1605(a)(7).

This result comports with the longstanding default rule that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law." *Bruner* v. *United States*, 343 U.S. 112, 116-17 (1952). *See also The Assessors* v. *Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1869) ("Jurisdiction * * * was conferred by an Act of Congress, and when that Act of Congress was repealed the Power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the Act of Congress.").

The same basic principles apply here, where Congress has repealed an exception to immunity and

immediately replaced it with a new provision that covers all pending cases. Just as newly-enacted exceptions to foreign sovereign immunity apply to cases based on prior events, so too should the newly-enacted Section 1605A(a) govern current cases—subject to the President's waiver authority and waiver as to Iraq.

B. Nothing In Section 1083 Limits The Repeal Of Section 1605(a)(7).

It is possible, of course, for Congress to express a contrary legislative intent. For example, in *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 576-77 (2006), the Court held that Congress did not intend for the limited divestment of habeas jurisdiction in the Detainee Treatment Act ("DTA") to apply to pending cases because the statute expressly provided that two accompanying jurisdictional provisions applied to pending cases, thus demonstrating a different intent with respect to the third.

Congress expressed no such intent to preserve Section 1605(a)(7) for these cases. No provisions of NDAA § 1083 were made selectively inapplicable to pending cases. To the contrary, Congress expressly provided that title 28 of the U.S. Code—on which Section 1330(a) jurisdiction depends—now contains Section 1605A but not Section 1605(a)(7). There is only a single U.S. Code, and it now has no Section 1605(a)(7) in it. Thus, unlike *Hamdan*, where the non-application of the DTA's prohibition on exercising habeas jurisdiction still left the unrepealed general habeas statute as a jurisdictional basis, there is no existing statutory provision conferring jurisdiction over these cases.

The NDAA is a prototypical instance in which a jurisdictional repealer applies to pending cases. Where Congress "'takes away no substantive right but simply changes the tribunal that is to hear the case,'" it is generally understood that Congress intends the repealer to apply to all pending cases. *Hamdan*, 548 U.S. at 577 (citation omitted). In the NDAA, Congress did not simply repeal Section 1605(a)(7) but simultaneously *replaced* it with a new jurisdictional provision that covers *every* pending Section 1605(a)(7) case. Subject to transitional refiling requirements, a plaintiff in a pending Section 1605(a)(7) case may bring its claims under new Section 1605A, without regard to defenses of res judicata, collateral estoppel, or limitations.[10] Indeed, Congress did not even change the forum for such actions, and it significantly *expanded* the plaintiffs' rights. *See, e.g.*, 28 U.S.C. § 1605A(b) (new limitations period), *id.* § 1605A(c) (new private right of action including punitive damages); *id.* § 1605A(g) (lis pendens).

To be sure, the *President's* subsequent waiver of Section 1605A's application to Iraq confirmed Iraq's immunity in these cases by eliminating that statute's applicability as to Iraq. But Congress unambiguously provided that this waiver would apply to pending cases. *See* NDAA § 1083(d)(2) (waiver applies to prior conduct and "regardless of whether, or the extent to which, [the waiver] affects any action filed before, on, or after the date of [the waiver] or of the

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[10] *See* 28 U.S.C. § 1605A(a)(2)(A)(ii); NDAA § 1083(c)(3) (authorizing Section 1605A action "arising out of the same act or incident" as pending Section 1605(a)(7) action); *id.* § 1083(b)(2)(A), (B) (authorizing motions to convert certain actions and waiving defenses).

enactment of this Act"). Thus, the question is whether *Congress's* repeal of Section 1605(a)(7)—which applied to all nations covered by that provision, not just Iraq—is subject to the usual rule that jurisdictional repealers apply to pending cases. It is. Far from leaving Section 1605(a)(7) plaintiffs with no forum as a result of that repeal, Congress simultaneously enacted a replacement provision that encompasses all pending claims (and also creates new procedural and substantive rights for plaintiffs).[11]

Other provisions of Section 1083 confirm that fact. Congress amended the main attachment provisions of the FSIA to replace Section 1605(a)(7) with Section 1605A so that the new immunity exception governs attachments for all judgments. *See* NDAA § 1083(b)(3)(A), (B) (amending 28 U.S.C. §§ 1610(a), (b)). By contrast, Congress amended the special provisions relating to attachments against U.S.-

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[11] Thus, the NDAA's repeal of Section 1605(a)(7) was not "retroactive" as to plaintiffs because it did not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994). To the contrary, the repeal and replacement of Section 1605(a)(7) gave plaintiffs *increased* rights. Nor was the President's waiver as to Iraq (which in any event expressly applies to pending cases) retroactive here. That waiver, like the EWSAA determination before it, simply restored Iraq's immunity to what it was in 1991 and 1995, when the underlying events in these cases occurred. *See Acree*, 370 F.3d at 65 (Roberts, J., concurring) ("At the time of the primary conduct at issue here, the jurisdictional grant of Section 1605(a)(7) did not even exist."). Moreover, the waiver extinguished no claims, only U.S. jurisdiction to hear them. And "[a]ny claim plaintiffs could have brought was in any event always subject to compromise or abrogation by the Executive." *Id.* (citing *Garamendi*, *supra*, and *Dames & Moore*, *supra*).

blocked assets to refer to both Section 1605A *and* Section 1605(a)(7) "as in effect *before* the enactment of section 1605A." *Id.* 1083(b)(3)(C) (amending 28 U.S.C. § 1610(f)) (emphasis added). This confirms both that former Section 1605(a)(7) is no longer "in effect" after the NDAA, and that Congress knew how to make limited ongoing reference to that section when it wanted to. It made no provision, however, for sustaining that section as a basis for ongoing jurisdiction in this or any other case.

Although there is no need to consult legislative history because 28 U.S.C. § 1330(a) is unambiguous that the Court lacks jurisdiction, the NDAA conference report confirms Congress's intent that Section 1605A is now the sole basis for FSIA jurisdiction based on a state-sponsor-of-terrorism designation. The stated purpose of Section 1083 was to "*consolidate* provisions relating to the exception to sovereign immunity for state sponsors of terrorism in a new section 1605A to the FSIA, and *repeal* the previous exception set out in section 1605(a)(7)." H.R. Rep. No. 110-477, at 1000 (2007) (emphases added). Thus, the report specifically confirmed that "[c]laims brought prior to the enactment of [the NDAA] against a foreign state that at the time was designated as a state sponsor of terrorism, or an action related to such a claim, would still be heard *under this section [i.e., Section 1605A]*." *Id.* at 1001 (emphasis added).

Finally, Section 1083(d), a post-veto addition, states the "sense of the Congress" that the Executive should work with Iraq on a "state-to-state basis" to address any meritorious claims that "cannot be addressed in courts in the United States due to the exercise of the waiver authority * * *." NDAA §

1083(d)(4). This confirms Congress's understanding that the President's waiver would in fact result in dismissal of claims against Iraq. Various members of Congress, even those opposed to the waiver, expressed the same understanding in the floor debates on the re-enacted law. *See* 154 Cong. Rec. H257 (Jan. 16, 2008) (waiver is appropriate "because certainly we can't or shouldn't hold the current government of Iraq responsible for things done by its predecessor, Saddam Hussein") (Rep. Saxton); *id.* at S54 (Jan. 22, 2008) (waiver applies to Iraq but "other cases against state sponsors of terrorism, including both Iran and Libya, may proceed to judgment and collection under section 1083") (Sen. Levin); *id.* at S55 (waiver would allegedly "prevent victims of past Iraqi terrorism—for acts committed by Saddam Hussein—from achieving the same justice as victims of other countries.") (Sen. Lautenberg).[12]

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[12] Respondents have previously cited "extended" remarks of one NDAA opponent, which were inserted into the Congressional Record after the fact. See 154 Cong. Rec. E46-47 (Jan. 17, 2008) (Rep. Conyers); *id.* at E1 (extended remarks are not delivered on House floor). Those remarks are of no use in determining the NDAA's meaning. *See Hamdan*, 548 U.S. at 580 n.10 (dismissing statements "inserted into the Congressional Record after the Senate debate"); *Garcia* v. *United States*, 469 U.S. 70, 76 (1984) ("committee reports," not "passing comments of one Member," are "authoritative" legislative history); *Quern* v. *Mandley*, 436 U.S. 725, 736 n.10 (1978) ("post hoc observations by a single member of Congress carry little if any weight"); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951) ("fears and doubts of the opposition are no authoritative guide to the construction of legislation").

In any event, Rep. Conyers merely stated his view that a single case—*Acree*—would be "unaffected" by the NDAA waiver because the waiver allegedly "does not affect rights under current law." *See* 154 Cong. Rec. at E46-47 (referring to case brought by 17 soldiers); *Acree*, 370 F.3d at 411 (noting 17

C. The Provisions Relied On By The D.C. Circuit Do Not Overcome Or Undermine The Repeal Of Section 1605(a)(7).

The four NDAA provisions relied on below by the D.C. Circuit do not express any intent to save pending cases from the express repeal of Section 1605(a)(7), much less override the unambiguous language of Section 1330(a).

1. The D.C. Circuit placed great weight on NDAA § 1083(c)(1), which states that "[t]he amendments made by this section shall apply to any claim arising under Section 1605A." NDAA § 1083(c)(1). It reasoned that "a claim pending under former § 1605(a)(7) when the NDAA became law did not 'aris(e) under section 1605A.'" JA325. Thus, according to the court, *nothing* in NDAA § 1083—including its repeal of Section 1605(a)(7)—can ever apply to a pending case. *Id.* ("§ 1083(c)(1) makes clear the 'amendments' apply * * * to no 'pending' claims").

The court erred. Section 1083(c) is entitled "Application to Pending Cases," showing that Congress did not intend for pending cases to be wholly exempt from the NDAA's application. To the contrary, Section 1083(c)(2)(A) applies *only* to pending cases, as it authorizes the filing of a specific motion in cases then-pending when the NDAA was enacted. Yet under the D.C. Circuit's interpretation, that amendment could not apply to the only instance it covers. That is nonsensical. Even if one accepts the court's mistaken interpretation of Section 1083(c)(1) that a claim only "arises under" the law

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plaintiffs). He was essentially right as to *Acree*. The D.C. Circuit had dismissed *Acree* prior to the NDAA, and the waiver did not affect that dismissal.

creating the cause of action, *id.*, pending claims invoking the state-sponsor-of-terrorism exception do in fact arise under Section 1605A because they are cognizable, and may be asserted, under that provision.[13] Inchoate claims "arise under" a body of law regardless of whether they have yet been asserted under it. *Cf. Caterpillar, Inc.* v. *Williams*, 482 U.S. 386, 393 (1987) (completely-preempted state law claim "arises under" federal law "from its inception").

Read correctly, Section 1083(c)(1) provides the opposite of what the D.C. Circuit thought. The NDAA amendments apply to "*any*" claim arising (*i.e.*, cognizable) under Section 1605A, including then-pending ones. This confirms Congress's intent to "*consolidate* provisions relating to the exception to sovereign immunity for state sponsors of terrorism in a new section 1605A." H.R. Rep. No. 110-477, at 1000.

2. The court also relied on NDAA § 1083(c)(3), which allows Section 1605(a)(7) cases to be refiled under Section 1605A within 60 days after the later of the NDAA's enactment or "the date of the entry of judgment in the original action." NDAA § 1083(c)(3). It reasoned that "[t]here would be no reason for the Congress to have tied the 60-day period to the date of 'entry of judgment' in a case pending under § 1605(a)(7) when the NDAA became law if * * * the

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[13] The correct reading is that the NDAA amendments apply to any claims that can be asserted under Section 1605A's immunity exception. *Cf.* 28 U.S.C. § 2254(i) (referring to proceedings "arising under" habeas jurisdictional grant). This includes state and foreign law claims, not just those cognizable under the new cause of action in Section 1605A(c). Otherwise, Section 1083's many plaintiff-friendly amendments would not apply to most claims cognizable under the auspices of Section 1605A.

Act requires the dismissal of all pending cases." JA327-28. That is wrong for two reasons.

First, a final dismissal for lack of jurisdiction is in fact an "entry of judgment." *See Bruner*, 343 U.S. at 113 (district court "entered judgment dismissing petitioner's complaint for want of jurisdiction"). Thus, by allowing re-filing after judgment, Congress protected plaintiffs who may have been unaware of the NDAA's enactment from the draconian result that would otherwise occur if the defendant sought dismissal more than 60 days after that enactment. By contrast, the D.C. Circuit's interpretation—that a Section 1605(a)(7) plaintiff may re-file only after a judgment on the *merits*—is not only atextual but makes no sense, since that is when re-filing will most likely be unnecessary, either because the plaintiff has already lost or has already won.

Second, if an action involves multiple parties or claims, or alternative theories, only some of which are based on former Section 1605(a)(7), there will be no entry of judgment until final adjudication of the other claims (absent Fed. R. Civ. P. 54(b) certification). Thus, in these cases as well, plaintiffs may await a final judgment before re-filing under Section 1605A. Although the D.C. Circuit wrongly believed that such cases are impossible, *see* JA328 n.*, this scenario occurs, at a minimum, whenever a foreign sovereign is sued under both the state-sponsor-of-terrorism exception and another exception, or whenever claims against a foreign sovereign under Section 1605(a)(7) are combined with claims against non-sovereign parties. *See, e.g.*, *Abur* v. *Republic of Sudan*, 437 F. Supp. 2d 166, 169 n.4, 177 (D.D.C. 2006) (noting "presence of non-sovereign defendants in this action" and that Sudan was sued under both

Section 1605(a)(7) and waiver-of-immunity exception in 28 U.S.C. § 1605(a)(1)). In these cases, a plaintiff may proceed to judgment on the other claims before re-filing under Section 1605A.

Therefore, Section 1083(c)(3) is fully consistent with Congress's intent to consolidate all claims under new Section 1605A, and evinces no intent to overcome the normal rule that jurisdictional repealers of this sort apply to pending cases.

3. The D.C. Circuit's reliance on Section 1083(c)(4)—the provision referring to the expired EWSAA—was likewise misplaced. The court held that this provision is "clear" that Congress intended to qualify the repeal of Section 1605(a)(7) for pending cases. JA329. But nothing in Section 1083(c)(4) says that, much less clearly so.

The provision does not even refer specifically to Section 1605(a)(7). Rather, it states that the EWSAA authority does not cover "any provision of chapter 97 of title 28, United States Code [*i.e.*, the entire FSIA], or the removal of the jurisdiction of any court of the United States." NDAA § 1083(c)(4). This language includes not just former Section 1605(a)(7), but also new Section 1605A. It was thus an apparent (albeit unsuccessful) attempt to prevent arguments that the President's EWSAA determination applied to cases originally brought under Section 1605(a)(7) and transferred to Section 1605A.[14] If the drafters had only been concerned about the EWSAA as applied to pending Section 1605(a)(7) cases, they would have referred to such cases specifically rather than broadly referring to the entire FSIA. But at a

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[14] Any such arguments were mooted by the President's waiver of Section 1605A as to Iraq.

minimum, nothing in Section 1083(c)(4)—which was in any event waived to the extent it affects Iraq, *see supra* at 37—remotely qualifies the unqualified repeal of Section 1605(a)(7).

4. The same is true with regard to the waiver authority of NDAA § 1083(d)(1). The D.C. Circuit believed that if Section 1605(a)(7) were repealed as to pending cases "the President could use § 1083(d)(1) to deprive the courts of jurisdiction and would have no reason ever to invoke the EWSAA; § 1083(c)(4) would be surplusage." JA329. But the EWSAA authority *expired* long before the NDAA. Thus, the President had ample reason to invoke the EWSAA in 2003, because Section 1605(a)(7) was still in effect then. Nor was Section 1083(c)(4) surplusage. It was originally drafted prior to the veto, without contemplation of the addition of a waiver authority. The President's exercise of that authority has now rendered that provision—like Section 1605A itself—inapplicable as to Iraq. But if the President had not exercised the waiver, or had exercised it only in part, Section 1083(c)(4) would not have been redundant for the reasons set forth above (although it would have been ineffective as to the prior EWSAA determination).[15]

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[15] Contrary to the D.C. Circuit's reasoning, JA329, nothing in NDAA § 1083(d)(2)(C), which allows the waiver authority to affect pending cases, overrides the repeal of Section 1605(a)(7). If the President had delayed exercising the waiver, it would apply to pending cases under Section 1605A. Moreover, the waiver would also affect pending cases—including *Beaty* and *Simon*—convertible or converted to Section 1605A under NDAA §§ 1083(c)(2) and (3).

If Congress had truly intended to overturn the normal rule that jurisdictional repealers apply to pending cases, it would have done so directly—and certainly not through cryptic tea leaves scattered across Section 1083. In fact, the NDAA's intent and import is clear: Section 1605A is the only extant basis for FSIA jurisdiction based on a terrorism-sponsor designation, and that provision has been waived as to Iraq in accordance with authority that Congress expressly granted to the President.

III. THE RESTORATION OF IRAQ'S SOVEREIGN IMMUNITY EFFECTUATES IMPORTANT FOREIGN POLICIES.

This case cannot be divorced from the foreign policy concerns that underlie it. Before the FSIA, the Executive determined when foreign nations were entitled to immunity, and it was "not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Republic of Mexico*, 324 U.S. at 35. This case involves a limited restoration of this authority to the Executive. The President determined, based on *current* foreign policy concerns, that the new, democratic government of Iraq—now an ally in the fight against terrorism rather than a sponsor of it—should be freed from the punitive sanctions imposed on terrorism-sponsoring regimes.[16] That determination—fully authorized by statute and made by the branch of government responsible for formulating

[16] *See also* Br. for the U.S. as Amicus Curiae 17, No. 07-1090 (filed Dec. 5, 2008) (confirming that "the significant threat posed to Iraq's stability and redevelopment by terrorism-related lawsuits and enforcement actions has not diminished in the intervening years since the *Acree* decision").

foreign policy—should be respected rather than countermanded.

The determination effectuated the basic rationale of foreign sovereign immunity, which is predicated on the "perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other." *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cr.) 116, 137 (1812). Thus, how the United States treats other nations in its courts is fair game for how those nations will treat the United States in their courts. *See Lauritzen* v. *Larsen*, 345 U.S. 571, 582 (1953) ("nor should we forget that any contact which we hold sufficient to warrant application of *our* law to a foreign transaction will logically be as strong a warrant for a foreign country to apply *its* law to an American transaction") (emphasis supplied).

When Iraq was governed by an outlaw regime with which the United States had little interaction, former Section 1605(a)(7) was part of U.S. foreign policy to punish and marginalize that regime. But a dramatically different policy is now in place. The United States has forged deep ties with Iraq, and continues to be actively seeking to build and strengthen the new government and Iraq's economy. As the President determined, the continued imposition of sanctions such as former Section 1605(a)(7) threatens that critical relationship and U.S. foreign policies. The Saddam Hussein regime inflicted incalculable damage and suffering on the people of Iraq—vastly greater than the harm alleged in these cases. As a consequence, the new Government of Iraq tried and judged Saddam Hussein (and other former senior officials of the

regime) for crimes against the Iraqi people. On the order of Prime Minister Nouri al-Maliki following the judgment of the Iraqi court, Saddam Hussein was executed for those crimes. Yet the D.C. Circuit countermanded Presidential determinations and held that these plaintiffs were entitled to seek further retribution from the people of Iraq, who were victims themselves of the Hussein regime.

Moreover, U.S. involvement in Iraq is now far greater than any involvement of the Saddam Hussein regime with U.S. citizens. And that U.S. involvement has, unfortunately, led to significant grievances on the part of Iraqi citizens. It is therefore not unreasonable to think that if Iraq's immunity from suit for public acts is not recognized in the United States, some in Iraq may seek the same treatment for the United States in Iraq.[17]

This is not just an academic debate. Imperative foreign policy concerns underlie the President's valid exercise of the authority granted him by Congress. For instance, immunity for U.S. personnel in Iraq was a key component of the landmark Agreement Between the United States of America and the Republic of Iraq providing for the Status of U.S. Forces in Iraq recently concluded between Iraq and the United States. *See* Agreement Between the

[17] *See, e.g.*, Gartenstein-Ross, *supra*, at 918 ("It is difficult to formulate a principle that would allow terrorism exception suits in U.S. courts and simultaneously prevent foreign courts from entertaining suits directed at the United States or its allies for their foreign policy."); Amy Falls, *Acree* v. *Republic of Iraq: Holding a Fragile, U.S.-Backed Government Civilly Liable for the Wrongdoings of the Previous, Ousted Regime*, 73 Geo. Wash. L. Rev. 880, 893 (2005) (*Acree* holding "could potentially devastate the already precarious foreign relationship between the United States and Iraq").

United States of America and the Republic of Iraq, art. 12 (effective Jan. 1, 2009) ("Status of Forces Agreement" or "SOFA") (www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf). The SOFA, however, will be put to a popular referendum in Iraq by July 2009, and a vote of disapproval would void the agreement. *See* Alissa Rubin & Campbell Robertson, *Iraq Backs Deal That Sets End of U.S. Role*, N.Y. Times, Nov. 28, 2008, at A1.

A denial of Iraq's immunity here could well affect that vote. Indeed, it was reported that SOFA opponents in Iraq's Parliament raised concerns about whether "Iraqi assets would continue to be protected against claims that could not only consume billions of dollars but also make it difficult for Iraq to sell oil and move the proceeds through banks," specifically including pending claims under former Section 1605(a)(7).[18] These opponents, it was reported, sought U.S. Government assurances that Iraq's immunity would be respected. *Id.*

Thus, the current bilateral relationship between the two States would be adversely impacted if claims by U.S. plaintiffs against the former Iraqi regime may proceed against the new Government of Iraq while reciprocal claims by Iraqis against the United States Government (which would no doubt be

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[18] James Glanz & Steven Myers, *Iraqi Foes of Security Deal Seek to Shield Assets*, N.Y. Times, Nov. 24, 2008, at A6 (concerns included claims "by Americans who were badly treated as prisoners of war or used as 'human shields' against American bombardment in the 1991 war," and claims "that Mr. Hussein was * * * behind the Oklahoma City bombing in 1995 or the World Trade Center attacks on Sept. 11, 2001"). These descriptions cover pending Section 1605(a)(7) cases against Iraq. *See supra* note 3.

numerous) may not. Currently, there is political impetus and support within Iraq to handle such reciprocal claims by Iraqis against the United States through a State-to-State agreed process (as good relations between respectful allies demands). However, should claims by U.S. plaintiffs against the former Saddam regime be allowed to proceed in U.S. courts against the new Government of Iraq, then that impetus is more than likely to disappear. In such circumstances, the pressure to subject the United States and its soldiers and contractors to the full jurisdiction of Iraqi courts will likely increase in the Iraqi Parliament and the councils of the Government of Iraq. Such developments obviously would complicate the current good working relationship between the two nations.

Abrogation of Iraq's sovereign immunity is also likely to cause adverse economic consequences for the United States. To date, Iraq has elected to keep the sizeable funds of the Development Fund for Iraq—earmarked for Iraq's reconstruction—in the United States. And Iraq has elected to denominate its oil sales in dollars, resulting in a flow of funds through the U.S. Federal Reserve. These actions reflect the ever-increasing economic ties between the now-friendly nations. If, however, those funds were threatened with attachment to satisfy judgments or potential judgments arising from the conduct of the former regime, the Government of Iraq understandably would be compelled to take measures to protect its sovereign assets—which may include removing them from the United States and redenominating oil transactions in another currency. As the President determined, such prudent actions would adversely affect the bilateral economic relationship.

See JA413 ("By potentially forcing a close U.S. ally to withdraw significant funds from the U.S. financial system, section 1083 would cast doubt on whether the United States remains a safe place to invest and to hold financial assets. Iraqi entities would be deterred from engaging in commercial partnerships with U.S. businesses for fear of entangling assets in lawsuits.").

It is for reasons such as these that foreign sovereign immunity has always "reflect[ed] *current* political realities and relationships, and aims to give foreign states and their instrumentalities some *present* 'protection from the inconvenience of suit as a gesture of comity.'" *Republic of Austria*, 541 U.S. at 696 (first emphasis added; citation omitted). Thus, before the FSIA, courts would "surrender" their jurisdiction upon an Executive determination of immunity. *Republic of Mexico*, 324 U.S. at 34. For example, in *Rich* v. *Naviera Vacuba S.A.*, 295 F.2d 24, 26 (4th Cir. 1961), the court enforced a State Department certification of immunity "without further inquiry" in a pending case, even though the foreign nation had previously waived its own immunity in the case.

So too here, the President's determinations effectuated the current foreign policy of the United States that seeks to rebuild and support Iraq, and the new diplomatic relationship between the nations. That policy and relationship would be endangered by continuing to subject the new government of Iraq to onerous lawsuits seeking billons in damages based on a sanction—the stripping of Iraq's sovereign immunity—that applies to terrorism-sponsoring regimes. As this Court has noted, "claims remaining in the aftermath of hostilities may be 'sources of

friction' acting as an 'impediment to resumption of friendly relations' between the countries involved." *Garamendi*, 539 U.S. at 420 (citations omitted).

The recognition of Iraq's sovereign immunity, moreover, will not deprive plaintiffs of the ability to pursue claims for compensation. Rather, it means that those claims will have to be pursued as claims against allied nations for the misdeeds of hostile former regimes have always been pursued in the past: through State-to-State negotiations, rather than subjecting each nation to coercive lawsuits in the courts of the other. For example, courts have uniformly rejected claims against Germany and Japan for the acts of their prior regimes. *See, e.g.*, *Hwang Geum Joo* v. *Japan*, 413 F.3d 45, 50 (D.C. Cir. 2005) (effectuating U.S. policy "that all war-related claims against Japan be resolved through government-to-government negotiations rather than through private tort suits"); *Princz* v. *Fed. Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994).

Iraq should be treated no differently. The NDAA sets forth the "sense of Congress" that the President "should work with the Government of Iraq on a state-to-state basis" to resolve waived claims against Iraq. NDAA § 1083(d)(4). And that has long been the Executive's policy as well. *See* U.S. *Beaty* Statement of Interest at 16 n.9 (supporting recognition of Iraq's sovereign immunity in U.S. courts and noting that pending claims should be addressed following "the establishment of a successor government capable of negotiating the diplomatic or other resolution of claims arising from the misdeeds of its predecessor") (JA83). Appropriately, however, any State-to-State discussions would have to encompass myriad, complex issues on both sides of

the table. "[O]ur national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings." *Republic of Peru*, 318 U.S. at 589.

Just as the United States undoubtedly would expect that its accountability in Iraq for noncommercial acts involving Iraqi citizens be addressed through diplomatic negotiations, the President made a reasoned determination—amply supported by broad statutory authority—that claims involving the Saddam Hussein regime should be addressed diplomatically as well. Whether this case is considered under the EWSAA or the NDAA, the result is the same. There is no extant statutory basis for abrogation of Iraq's sovereign immunity and thus no basis for subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed with instructions to dismiss the complaints for lack of subject matter jurisdiction.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS

Statute	Page
28 U.S.C. § 1330	1a
28 U.S.C. § 1605(a)(7) (2000) (repealed)	2a
Emergency Wartime Supplemental Authorization Act, 2003, Pub. L. No. 108-011, § 1503, 117 Stat. 559, 579 (2003)	4a
National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338 (2008)	6a

28 U.S.C. § 1330

Sec. 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. § 1605(a)(7) (2000) (repealed)

Sec. 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

* * *

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if—

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

Emergency Wartime Supplemental Authorization Act, 2003, Pub. L. No. 108-011, § 1503, 117 Stat. 559, 579 (2003)

SEC. 1503. The President may suspend the application of any provision of the Iraq Sanctions Act of 1990: *Provided*, That nothing in this section shall affect the applicability of the Iran-Iraq Arms Non-Proliferation Act of 1992 (Public Law 102-484), except that such Act shall not apply to humanitarian assistance and supplies: *Provided further*, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism: *Provided further*, That military equipment, as defined by title XVI, section 1608(1)(A) of Public Law 102-484, shall not be exported under the authority of this section: *Provided further*, That section 307 of the Foreign Assistance Act of 1961 shall not apply with respect to programs of international organizations for Iraq: *Provided further*, That provisions of law that direct the United States Government to vote against or oppose loans or other uses of funds, including for financial or technical assistance, in international financial institutions for Iraq shall not be construed as applying to Iraq: *Provided further*, That the President shall submit a notification 5 days prior to exercising any of the authorities described in this section to the committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives: *Provided further*, That not more than 60 days after enactment of this Act and every 90 days thereafter the President shall submit a

report to the Committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives containing a summary of all licenses approved for export to Iraq of any item on the Commerce Control List contained in the Export Administration Regulations, 15 CFR Part 774, Supplement 1, including identification of end users of such items: *Provided further*, That the authorities contained in this section shall expire on September 30, 2004, or on the date of enactment of a subsequent Act authorizing assistance for Iraq and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first.

National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338 (2008)

SEC. 1083. TERRORISM EXCEPTION TO IMMUNITY.

(a) TERRORISM EXCEPTION TO IMMUNITY—

(1) IN GENERAL—Chapter 97 of title 28, United States Code, is amended by inserting after section 1605 the following:

"§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

"(a) IN GENERAL—

"(1) NO IMMUNITY—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

"(2) CLAIM HEARD—The court shall hear a claim under this section if—

"(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed

under this section or was so designated within the 6-month period before the claim is filed under this section; or

"(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

"(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

"(I) a national of the United States;

"(II) a member of the armed forces; or

"(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

"(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

"(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

"(b) LIMITATIONS—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

"(1) 10 years after April 24, 1996; or

"(2) 10 years after the date on which the cause of action arose.

"(c) PRIVATE RIGHT OF ACTION—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

"(1) a national of the United States,

"(2) a member of the armed forces,

"(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

"(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic

damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

"(d) ADDITIONAL DAMAGES—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

"(e) SPECIAL MASTERS—

"(1) IN GENERAL—The courts of the United States may appoint special masters to hear damage claims brought under this section.

"(2) TRANSFER OF FUNDS—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

"(f) APPEAL—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

"(g) PROPERTY DISPOSITION.-

(1) IN GENERAL—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending

action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

"(A) subject to attachment in aid of execution, or execution, under section 1610;

"(B) located within that judicial district; and

"(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

"(2) NOTICE—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

"(3) ENFORCEABILITY—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

"(h) DEFINITIONS—For purposes of this section—

"(1) the term 'aircraft sabotage' has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

"(2) the term 'hostage taking' has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

"(3) the term 'material support or resources' has the meaning given that term in section 2339A of title 18;

"(4) the term 'armed forces' has the meaning given that term in section 101 of title 10;

"(5) the term 'national of the United States' has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

"(6) the term 'state sponsor of terrorism' means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

"(7) the terms 'torture' and 'extrajudicial killing' have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).".

(2) AMENDMENT TO CHAPTER ANALYSIS—The table of sections at the beginning of chapter 97 of title 28, United States Code, is amended by inserting after the item relating to section 1605 the following:

"1605A. Terrorism exception to the jurisdictional immunity of a foreign state.".

(b) CONFORMING AMENDMENTS—

(1) GENERAL EXCEPTION—Section 1605 of title 28, United States Code, is amended—

(A) in subsection (a)—

(i) in paragraph (5)(B), by inserting "or" after the semicolon;

(ii) in paragraph (6)(D), by striking "; or" and inserting a period; and

(iii) by striking paragraph (7);

(B) by repealing subsections (e) and (f); and

(C) in subsection (g)(1)(A), by striking "but for subsection (a)(7)" and inserting "but for section 1605A".

(2) COUNTERCLAIMS—Section 1607(a) of title 28, United States Code, is amended by inserting "or 1605A" after "1605".

(3) PROPERTY—Section 1610 of title 28, United States Code, is amended—

(A) in subsection (a)(7), by striking "1605(a)(7)" and inserting "1605A";

(B) in subsection (b)(2), by striking "(5), or (7), or 1605(b)" and inserting "or (5), 1605(b), or 1605A";

(C) in subsection (f), in paragraphs (1)(A) and (2)(A), by inserting "(as in effect before the enactment of section 1605A) or section 1605A" after "1605(a)(7)"; and

(D) by adding at the end the following:

"(g) PROPERTY IN CERTAIN ACTIONS—

"(1) IN GENERAL—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

"(A) the level of economic control over the property by the government of the foreign state;

"(B) whether the profits of the property go to that government;

"(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

"(D) whether that government is the sole beneficiary in interest of the property; or

"(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

"(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

"(3) THIRD-PARTY JOINT PROPERTY HOLDERS—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.".

(4) VICTIMS OF CRIME ACT—Section 1404C(a)(3) of the Victims of Crime Act of 1984 (42 U.S.C. 10603c(a)(3)) is amended by striking "December 21, 1988 with respect to which an investigation or" and inserting "October 23, 1983, with respect to which an investigation or civil or criminal".

(c) APPLICATION TO PENDING CASES—

(1) IN GENERAL—The amendments made by this section shall apply to any claim arising under section 1605A of title 28, United States Code.

(2) PRIOR ACTIONS—

(A) IN GENERAL—With respect to any action that—

(i) was brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), before the date of the enactment of this Act,

(ii) relied upon either such provision as creating a cause of action,

(iii) has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action against the state, and

(iv) as of such date of enactment, is before the courts in any form, including on appeal or motion under rule 60(b) of the Federal Rules of Civil Procedure,

that action, and any judgment in the action shall, on motion made by plaintiffs to the United States district court where the action was initially brought, or judgment in the action was initially entered, be given effect as if the action had originally been filed under section 1605A(c) of title 28, United States Code.

(B) DEFENSES WAIVED—The defenses of res judicata, collateral estoppel, and limitation period are waived-

(i) in any action with respect to which a motion is made under subparagraph (A), or

(ii) in any action that was originally brought, before the date of the enactment of this Act, under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), and is refiled under section 1605A(c) of title 28, United States Code, to the extent such defenses are based on the claim in the action.

(C) TIME LIMITATIONS—A motion may be made or an action may be refiled under subparagraph (A) only—

(i) if the original action was commenced not later than the latter of—

(I) 10 years after April 24, 1996; or

(II) 10 years after the cause of action arose; and

(ii) within the 60-day period beginning on the date of the enactment of this Act.

(3) RELATED ACTIONS—If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), any other action arising out of the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after—

(A) the date of the entry of judgment in the original action; or

(B) the date of the enactment of this Act.

(4) PRESERVING THE JURISDICTION OF THE COURTS—Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

(d) APPLICABILITY TO IRAQ—

(1) APPLICABILITY—The President may waive any provision of this section with respect to Iraq, insofar as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof, if the President determines that—

(A) the waiver is in the national security interest of the United States;

(B) the waiver will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq; and

(C) Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.

(2) TEMPORAL SCOPE—The authority under paragraph (1) shall apply—

(A) with respect to any conduct or event occurring before or on the date of the enactment of this Act;

(B) with respect to any conduct or event occurring before or on the date of the exercise of that authority; and

(C) regardless of whether, or the extent to which, the exercise of that authority affects any action filed before, on, or after the date of the exercise of that authority or of the enactment of this Act.

(3) NOTIFICATION TO CONGRESS—A waiver by the President under paragraph (1) shall cease to be effective 30 days after it is made unless the President has notified Congress in writing of the basis for the waiver as determined by the President under paragraph (1).

(4) SENSE OF CONGRESS—It is the sense of the Congress that the President, acting through the Secretary of State, should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime against individuals who were United States nationals or members of the United States Armed Forces at the time of those terrorist acts and whose claims cannot be addressed in courts in the United

States due to the exercise of the waiver authority under paragraph (1).

(e) SEVERABILITY—If any provision of this section or the amendments made by this section, or the application of such provision to any person or circumstance, is held invalid, the remainder of this section and such amendments, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.

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Nos. 07-1090 & 08-539

FILED
MAR 18 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

REPUBLIC OF IRAQ,

Petitioner,

v.

JORDAN BEATY, et al.,

Respondents.

REPUBLIC OF IRAQ,

Petitioner,

v.

ROBIN SIMON, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether the Republic of Iraq's sovereign immunity, abrogated in part under 28 U.S.C. § 1605(a)(7), was restored under § 1503 of the Emergency Wartime Supplemental Appropriations Act, Pub. L. No. 108-11, 117 Stat. 559 (2003), as implemented by Presidential Determination 2003-23.

2. Whether the President's waiver exercised pursuant to § 1083 of the National Defense Appropriations Act for 2008, Pub. L. No. 110-181, 122 Stat. 342 (2008), retroactively divested the federal courts of jurisdiction under 28 U.S.C. § 1605(a)(7) over cases pending against Iraq prior to the waiver, thereby eliminating the Respondents' right to a substantive cause of action.

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OPINIONS BELOW

The order of the D.C. Circuit granting summary affirmance is unreported and is reproduced in the Joint Appendix at page JA313. The opinion of the District Court is reported *sub nom. Beaty v. Republic of Iraq*, 480 F. Supp. 2d 60 (D.D.C. 2007) and is reproduced in the Joint Appendix at page JA219.

APPLICABLE STATUTES

The text of the relevant statutes is set forth in the appendix to this reply.

STATEMENT OF THE CASE

The Respondents, Jordan Beaty; A.M.B., a minor by her next friend Robin Beaty; William R. Barloon; Bryan C. Barloon; and Rebecca L. Barloon, are the children of Kenneth Beaty and William Barloon, both of whom were Plaintiffs in *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001).

Following the conclusion of hostilities between the United States and Petitioner Republic of Iraq ("Iraq") in 1991, Kenneth Beaty ("Beaty") and William Barloon ("Barloon") each resided in Kuwait on a temporary basis. JA381. Mr. Beaty worked as an oil rig drilling supervisor. *Id.* Mr. Barloon supervised aircraft maintenance and overhaul. *Id.*

On April 25, 1993, Mr. Beaty was traveling to an oil rig in Kuwait, but within sight of the Iraqi border. JA383. Mr. Beaty stopped at a border checkpoint. *Id.* He was asked to and displayed his credentials to the Iraqi border guards. *Id.* Mr. Beaty explained that he did not want to enter Iraq. Instead, he desired to travel to the oil rig using roads within Kuwait. *Id.* The border guards responded by arresting Mr. Beaty. *Id.* The Iraqi guards then blindfolded Mr. Beaty and transported him at gunpoint, first to Basra, Iraq, and later to Baghdad. JA384.

Once in Baghdad, Mr. Beaty was initially confined in a car park, converted into a prison, in a cell that lacked water or a toilet. *Id.* He had only a steel cot for a bed. *Id.* He was later transferred to Abu Ghraib prison in Baghdad. *Id.* He lived in a cell infested with vermin and shared a toilet with more than 200 other prisoners. *Id.* During his 205 days in captivity, Mr. Beaty was denied adequate food, water and medical attention. JA382 and 384. Iraq held Mr. Beaty as a hostage for ransom. JA385. Ultimately, he was released when the ransom of $5,000,000 was paid to the Iraqi government. *Id.*

On or about March 13, 1995, William Barloon was traveling near the Kuwait-Iraqi border when he encountered an Iraqi border guard. *Id.* The border guard checked Mr. Barloon's identification, which demonstrated that he was a citizen of the United States. *Id.* The border guard then took Mr. Barloon into custody. *Id.*

Mr. Barloon was transported at gunpoint to Basra, Iraq, and later to Baghdad. JA221. He was held captive at Abu Ghraib prison. *Id.* During his 126 days in captivity, Mr. Barloon was tortured, beaten, subjected to mock executions and deprived of adequate, food, water, medical care and access to toilet facilities. *Id.* Mr. Barloon lost a significant amount of weight and became hopeless and despondent. JA385.

Respondents endured severe mental anguish, depression, humiliation, anxiety, and pain and suffering as a direct result of their fathers' captivity. Throughout their ordeal, Respondents were acutely aware of the circumstances surrounding their fathers' hostage-taking and mistreatment. Respondents knew that their fathers were being held captive by Petitioner without any legal justification. Through various media sources, Respondents were able to see where their fathers were being held. Through these and other sources, Respondents contemporaneously learned and understood that their fathers were deprived of adequate food, water and medical care, had lost substantial weight and were emotionally distraught.

Because of their fathers' captivity, Respondents were totally dependent upon their mothers for financial and emotional support. However, Respondents' mothers were not in a position to provide such support because they too suffered extreme emotional distress as a result of their husbands' ordeals. JA388. Mrs. Beaty and Mrs. Barloon were devoting themselves to the various efforts to secure their husbands'

release. JA384. Such efforts often took them away from their children, both physically and emotionally, for extended periods. JA384.

Respondents' severe mental anguish did not end, even after their fathers' return. Although their fathers were physically present, they were emotionally absent, and unable to provide the love and support their children desperately needed. JA387. As Judge Oberdorfer recognized in *Daliberti*:

> Following their release, [Mr. Beaty and Mr. Barloon] exhibited marked changes in personality, such as anger, feelings of detachment and isolation, nightmares, and insomnia. Each [of them] has suffered significant damage to his marriage and has ongoing problems with intimacy and personal relationships. . . . [T]hese men will experience these effects for the rest of their lives.

Id.

In 2003, Respondents filed an action against Iraq, under the state-sponsored terrorism exception to sovereign immunity codified in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(7), in the U.S. District Court for the District of Columbia for intentional infliction of emotional distress under state common law. They also attempted to assert claims for violations of customary international law as incorporated into federal common law and loss of solatium under federal common law. JA220.

Iraq filed a motion to dismiss the case asserting lack of jurisdiction under § 1605(a)(7), failure to state a cause of action under federal and state common law, and presentation of a non-justiciable political question. *Id.* Respondents moved for summary judgment as to liability on all causes of actions alleged in the Third Amended Complaint. *Id.*

On March 20, 2007, the District Court entered a comprehensive Memorandum Opinion granting in part and denying in part Iraq's motion to dismiss, and granting in part and denying in part Plaintiffs' motion for partial summary judgment. JA219-308 The District Court held that Respondents stated a cause of action under state common law; jurisdiction existed under § 1605(a)(7); and the suit was not barred by the political question doctrine, the act of state doctrine or the doctrine of foreign affairs preemption. JA310. It granted Iraq's Motion to Dismiss as to Respondents' other claims. *Id.*

Iraq appealed the District Court's denial of its claim of sovereign immunity as a collateral order and moved the District Court to certify its decision for interlocutory appeal under 28 U.S.C. § 1292(b). The District Court granted Iraq's motion to certify its order for interlocutory appeal on April 19, 2007.

Iraq then filed a petition for initial hearing *en banc* of the District Court's decision regarding its sovereign immunity, urging the D.C. Circuit to reconsider its decision in *Acree*. On June 7, 2007,

Respondents moved for summary affirmance on the basis of *Acree*. JA2.

On November 6, 2007, the D.C. Circuit denied the petition for initial hearing *en banc*. JA6. On November 21, 2007, the D.C. Circuit summarily denied Iraq's appeal and stated:

> The District Court correctly held that the Republic of Iraq's sovereign immunity, waived or abrogated under 28 U.S.C. § 1605(a)(7), has not been restored under the Emergency Wartime Supplemental Appropriations Act ("EWSAA"), Pub. L. No. 108-11, 117 Stat. 559 (2003), and Presidential Determination 2003-23. *See Acree v. Republic of Iraq*, 370 F.3d 41, 51 (D.C. Cir. 2004).

Id. Subsequently, Iraq filed the instant Petition. JA7.

On December 19, 2007, in Iraq's interlocutory appeal, *In re: Republic of Iraq*, No. 07-8004 (D.C. Cir. 2007), the D.C. Circuit ordered on its own motion that the case be held in abeyance pending resolution of *Simon v. Republic of Iraq*, No. 06-7175 (D.C. Cir. 2006). Following the resolution of the appeal in *Simon*, Iraq filed a motion requesting that the case be held in abeyance until the resolution of the instant appeal. On September 24, 2008, the D.C. Circuit granted Iraq's unopposed motion and has held the case in abeyance pending a future order of the Court.

SUMMARY OF ARGUMENT

Because Iraq requests that this Court hold that EWSAA § 1503 and NDAA § 1083 retroactively repealed 28 U.S.C. § 1605(a)(7) jurisdiction in pending cases, the questions presented are resolved in the negative simply by the fact that neither statute contains an express directive from Congress that the statutes are to apply retroactively. Notwithstanding the foregoing, as described below, Iraq's arguments must also fail because the plain language of EWSAA § 1503 and NDAA § 1083 did not authorize a repeal of § 1605(a)(7) in pending cases. Accordingly, this Court should affirm the District Court and the Circuit Court in all respects.

ARGUMENT

I. BECAUSE EWSAA § 1503 AND NDAA § 1083 DO NOT CONTAIN A CLEAR DIRECTIVE FROM CONGRESS THAT THEY WERE TO APPLY RETROACTIVELY, A RETROACTIVE DIVESTITURE OF THE RESPONDENTS' ACTIONS AGAINST IRAQ UNDER EITHER STATUTE IS IMPERMISSIBLE.

Under Iraq's construction of EWSAA[1] § 1503 and NDAA[2] § 1083, these statutes would apply retroactively

[1] Emergency Wartime Supplemental Appropriations Act of 2003 ("EWSAA"), Pub. L. No. 108-11, 117 Stat. 559 (2003).

[2] National Defense Authorization Act for 2008 ("NDAA"), Pub. L. No. 110-181, 122 Stat. 342 (2008).

to eliminate the lower court's jurisdiction over Respondents' pending cases and thereby divest them of their right to bring a cause of action against Iraq in any forum. As such, Iraq urges this Court to hold that Congress, without debating the issue or making an explicit statement in the statutes, intended to provide total amnesty to Iraq for all of its prior acts of torture and hostage taking. This construction must be rejected because it is contrary to the plain language of the statutes and the traditional rules of statutory interpretation.

Nothing in the language of EWSAA § 1503, Presidential Determination 2003-23[3], or NDAA § 1083 indicates that Congress or the President intended either statute to retroactively divest the federal courts of their jurisdiction to hear cases pursuant to 28 U.S.C. § 1605(a)(7). Under the traditional presumption against retroactivity and the rules of construction developed therefrom, the absence of such a directive is highly significant because the federal courts acting under § 1605(a)(7) provide the only forum in which Respondents' claims can be heard. This Court has established that, without an unambiguous directive from Congress stating otherwise, a jurisdiction-stripping statute that divests plaintiffs in pending cases of their right to bring a cause of action in any forum can only be applied **prospectively**. *See,*

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[3] Presidential Determination No. 2003-23, 68 Fed. Reg. 26459 (May 7, 2003)

e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 576-577 (2006); *see, e.g.*, *Hughes Aircraft Co. v. U.S.*, 520 U.S. 939, 951 (1997). Accordingly, EWSAA § 1503 and NDAA § 1083 cannot be construed to divest Respondents of their right to bring actions against Iraq, because they do not contain an unambiguous directive clearly indicating that Congress intended such a retroactive divestiture.

The traditional presumption against the retroactive application of statutes was described in *United States Fidelity & Guaranty Co. v. U.S.*, 209 U.S. 306, 314 (1908) as follows:

> There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes, as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. **It ought not to receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them**, or unless the intention of the legislature cannot be otherwise satisfied.

(emphasis added). The foregoing principle remains a primary rule of statutory interpretation in contemporary jurisprudence. *Immigration and Naturalization Servs. v. St. Cyr*, 533 U.S. 289, 316 (2001) ("[C]ongressional enactments . . . will not be construed to have

retroactive effect unless their language requires this result."), *quoting Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

This Court has frequently noted, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); *see Dash v. Van Kleeck*, 7 Johns. *477, *503 (N.Y. 1811) ("It is a principle of the *English*, common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect."). This presumption has been strictly adhered to by the courts with little variance throughout the course of U.S. legal history. *See Kaiser Aluminum & Chem., Corp. v. Bonjorno*, 494 U.S. 827, 842-44 (1990) (Scalia, J., concurring) ("During all of the 19th and most of the 20th centuries, our cases expressed and applied, to my knowledge without exception, the principle that legislation is to be applied only prospectively unless Congress specifies otherwise."). The rule is premised upon notions of fundamental fairness and the preference for predictability of outcomes which are hallmarks of American jurisprudence. *See GMC v. Romein*, 503 U.S. 181, 191 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions."); *Landgraf*, 511 U.S. at 272-73 ("Requiring clear intent assures that Congress itself has considered the

potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.").

To determine whether a statute will apply to pending cases, the courts first look to whether Congress has directed with the requisite clarity that the law be applied retroactively. *Martin v. Hadix*, 527 U.S. 343, 352 (1999).[4] If there is no congressional directive on the temporal reach of a statute, the court determines whether the application of the statute to the conduct at issue would result in a retroactive effect. *Id.* If the statute is found to have a retroactive effect, then in keeping with the traditional presumption against retroactivity, the statute is presumed not to apply to the pending cases it would affect. *Id.*; *Landgraf*, 511 U.S. at 280.

A. Congress did not direct that EWSAA § 1503 or NDAA § 1083 was to have retroactive temporal reach.

The standard for finding that Congress intended a statute to have retroactive temporal reach is a demanding one. *St. Cyr*, 533 U.S. at 316-17. "[C]ases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved

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[4] In determining whether a statute's terms would produce a retroactive effect, and in determining a statute's temporal reach, the normal statutory rules of construction apply. *Lindh v. Murphy*, 521 U.S. 320, 326 (1997).

statutory language that was so clear that it could sustain only one interpretation." *Lindh*, 521 U.S. at 328. In order to find that a statute is to apply retroactively there must be "clear evidence of congressional intent" in the form of "express command[s]" and "unambiguous directive[s]." *Landgraf*, 511 U.S. at 263-64, 272-73 (statutes "will not be construed to have retroactive effect unless their language requires this result"). In *Landgraf*, the Court offered the following as an example of language that might qualify as a clear statement that a statute was to apply retroactively: "[T]he new provisions shall apply to all proceedings pending on or commenced after the date of enactment." *Id.* at 260.

In EWSAA § 1503, Congress did not provide any directive that the powers conferred to the President were intended to apply retroactively. *See* Appendix at App. 1. The relevant language of § 1503 states:

> [T]he President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism. . . .

The language of the provision, including the key phrase "may make inapplicable", is framed in the present tense and makes no reference to pending actions. There is simply no indication that Congress intended the President's authority to extend retroactively, let alone an unambiguous express directive that could sustain only one such interpretation. The same is true of the language utilized by the President

in Presidential Determination No. 2003-23, which implemented his powers under the Act. *See* JA396. Presidential Determination No. 2003-23 states in pertinent part:

> I hereby . . . make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, Public Law 87-195, as amended (the "FAA"), and any other provision of law that applies to countries that have supported terrorism.

Because neither passage contains an explicit unambiguous statement defining the statute's temporal reach, the statute must be applied prospectively if it is found to have retroactive effect.

A prospective application of the President's powers under § 1503 is also in harmony with the congressional purpose of § 1503, which was to release the restrictions on economic aid to Iraq. Congress did not need to give Iraq complete amnesty for all its past actions to achieve this purpose. This goal was accomplished simply by removing Iraq's present designation under the statutes that sanctioned Iraq for its prior violations of international law.[5]

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[5] Mitchell Daniels, then Director of the Office of Management and Budget, in a letter forwarded to Speaker Hastert, explained the purpose and effect of § 1503:

> This provision would repeal the Iraq Sanctions Act of 1990, which requires the President to continue an embargo on Iraq and impose certain mandatory sanctions against Iraq, including prohibitions on arms

(Continued on following page)

NDAA § 1083 similarly lacks any indication that the repeal of § 1605(a)(7) was to apply retroactively. The relevant language of § 1083(b) states:

> (b) CONFORMING AMENDMENTS. –
>
> (1) GENERAL EXCEPTION. – Section 1605 of title 28, United States Code, is amended –
>
> (A) in subsection (a) – . . .
>
> (iii) by striking paragraph (7)

Again, nothing in the foregoing language could be interpreted to indicate that the repeal of § 1605(a)(7) was to be anything but prospective. The language is again framed in the present tense and makes no mention of pending cases.

The negative inference arising from the absence of any such directive in the repealing section is reinforced by a similar absence of such direction found in a related section of the statute § 1083(c), titled "APPLICATION TO PENDING CASES." Section 1083(c)(1), titled "IN GENERAL", states that "[t]he amendments made by this section shall apply to any claim arising under section 1605A of title 28, United States Code." Because the repeal of § 1605(a)(7) is

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> sales, certain exports, foreign assistance and Export-Import Bank Credits. It would also authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act.

Appendix of *Simon* Respondents' Brief in Opposition at 8a.

carried out solely through the above quoted § 1083(b) conforming amendment, this section is significant in that it does not provide that the § 1083 amendments apply to pending actions that arose under 28 U.S.C. § 1605(a)(7). If the conforming amendments apply only to claims arising under § 1605A, then the negative inference would be that they do not apply to effect claims brought under § 1605(a)(7) and do not repeal jurisdiction as conferred under that section as to those claims. Accordingly, pending § 1605(a)(7) actions would survive the enactment of § 1083.

Further, § 1083(c)(2), titled "PRIOR ACTIONS", is equally devoid of a directive that the repeal of § 1605(a)(7) is to apply retroactively. This section addresses only a limited class of cases that were brought under § 1605(a)(7) and § 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, which were adversely affected by the fact that these provisions failed to create a cause of action. *See, e.g., Acree v. Republic of Iraq*, 370 F.3d 41, 43 (D.C. Cir. 2004) (dismissing plaintiff's claims under § 1605(a)(7) on the grounds neither § 1605(a)(7) nor the Flatow Amendment creates a private right of action against foreign governments). Section 1083(c)(2) provides these plaintiffs with the opportunity to move to have these cases deemed re-filed under § 1605A, which explicitly states that it creates such a private right of action. *See* 28 U.S.C. § 1605A(c).

Finally, § 1083(c)(3), titled "RELATED ACTIONS", is the clearest contextual indicator that Congress did

not intend the statute to be retrospective. Section 1083(c)(3) provides plaintiffs who filed an action under § 1605(a)(7) with the right to file "any other action arising out of the same act or incident" under § 1605A within 60 days of "(A) the date of the entry of judgment in the original action; or (B) the date of the enactment of this Act." As the D.C. Circuit in *Simon v. Republic of Iraq*, 529 F.3d 1187, 1193 (D.C. Cir. 2008) found, it would be nonsensical for Congress to state that a plaintiff in a pending § 1605(a)(7) action could litigate their case to a final judgment more than sixty days after the enactment of the NDAA, if on its enactment § 1083 divested the courts of jurisdiction to hear such cases. Equally absurd is the idea that Congress, after eliminating a § 1605(a)(7) plaintiff's original action, would provide the plaintiff with the opportunity to file "other actions" related to the same act that gave rise to the § 1605(a)(7) action under § 1605A, but not the original action itself.

From the plain language of § 1083(b), the context provided by § 1083(c), and the total lack of any unambiguous directive from Congress that the statute was to apply retroactively, it is clear that the repeal of § 1605(a)(7) under § 1083 was intended to be solely prospective in application. *Acree*, 529 F.3d at 1193 ("The text and structure of the NDAA thus compel the conclusion that, notwithstanding the enactment of the NDAA, a court may still enter a judgment on the merits in such a case, which it could not do if it did not have jurisdiction over the case.").

B. Under the construction urged by Iraq EWSAA § 1503 and NDAA § 1083 would have an impermissible retroactive effect.

Given that neither EWSAA § 1503 nor NDAA § 1083 provide a clear and unambiguous directive from Congress that the statutes were to be applied retroactively, the Court must now determine whether the statutes, under the construction urged by Iraq, would have a retroactive effect. A court's inquiry into whether a statute operates retroactively "demands a commonsense, functional judgment about whether the new provision affects the substantive rights of the parties." *Martin*, 527 U.S. at 357-58, *quoting Landgraf*, 511 U.S. at 270. "This judgment should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Id.*

This Court has established that if a jurisdiction-stripping statute totally divests a plaintiff of his ability to bring an action by removing the jurisdiction of the only forum in which a suit may be brought, the statute affects the substantive rights of the party and has an impermissible retroactive effect. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 576-577 (2006); *see Hughes Aircraft Co. v. U.S.*, 520 U.S. 939, 951 (1997); *see Landgraf*, 511 U.S. at 274; *see also U.S. Fidelity*, 209 U.S. at 316.

In *U.S. Fidelity*, this Court addressed whether an amendment to a federal statute that temporarily

withdrew the district courts' jurisdiction to hear cases under the statute, could be applied retroactively to pending cases. 209 U.S. at 538-39. The Court held that by temporarily divesting the plaintiff of its right to sue, the statute had an impermissible retroactive affect on the plaintiff's substantive rights. *Id.* at 316. The defendants, in *U.S. Fidelity*, had entered into a contract and executed a bond with the United States for the construction of a lighthouse. *Id.* at 306. The plaintiff supplied defendants with goods for the purposes of construction. *Id.* at 308. When the defendants failed to pay for the goods, the United States brought suit on their behalf, pursuant to a federal bond collection statute. *Id.* The defendants demurred on the grounds that an amendment to the statute prohibited the trial court from taking jurisdiction. *Id.* at 311. The amendment had been passed after the plaintiff had performed under its contract with defendants, but prior to the filing of the plaintiff's suit. *Id.* The amendment provided, *inter alia*, that "not until after the complete performance of the contract for the performance of which the bond was given, and until the expiration of six months after such completion" could a plaintiff other than the United States bring suit to recover under the bond. *Id.* at 312-13. The defendant argued that because the lighthouse contract had not been completed at the time the plaintiff's suit was filed, the trial court had prematurely assumed jurisdiction. *Id.* The lower court denied the demurrer and the defendants subsequently appealed. *Id.* at 306. On appeal, the defendants contended the amendment was merely procedural and

therefore could be applied retroactively to the plaintiff's pending action. *Id.* at 313. This Court held that because the statute temporarily divested the plaintiff of the right to sue, it affected the plaintiff's substantive rights and could not be applied retroactively absent a contrary congressional directive. *Id.* at 316. The Court stated:

> Although the time in which to commence an action may be shortened and made applicable to causes of action already accrued, provided a reasonable time is left in which such actions may be commenced, **yet that is a different principle from taking away absolutely a present right to sue until a period of time, measured possibly by years, shall have elapsed**.

Id. (emphasis added, internal citations omitted).

In *Hallowell v. Commons*, 239 U.S. 506, 508 (1916), this Court, deciding a similar issue, revisited its holding in *U.S. Fidelity*. The *Hallowell* Court was presented with the question of whether a federal statute that provided the Secretary of the Interior with the sole discretion to establish equitable title to land held for American Indian allottees, could be applied retroactively to strip the jurisdiction of courts in pending cases. *Id.* The appellant, an American Indian, whose pending suit to settle equitable title in a United States district court had been dismissed, argued that under the Court's holding in *U.S. Fidelity* the statute could not be applied retroactively. *Id.* This Court distinguished *U.S. Fidelity* and held that "the

reference of the matter to the Secretary, unlike the changes with regard to suits upon bonds, **takes away no substantive right, but simply changes the tribunal to hear the case**." *Id.* (emphasis supplied). Finding that the mere change of tribunal to hear the allottee's case was procedural, the Court affirmed. *Id.*

From *U.S. Fidelity* and *Hallowell*, the rule emerged that a statute that totally divests a plaintiff of the right to bring a cause of action, even for a limited period of time, would be deemed to affect the substantive rights of the parties and have an impermissible retroactive effect. *Hallowell*, 239 U.S. at 508; *U.S. Fidelity*, 209 U.S. at 316.

Later, in *Hughes Aircraft*, the Court was presented with the issue of whether a statutory amendment that extended federal jurisdiction under the False Claims Act applied retroactively to conduct that occurred before its effective date. 520 U.S. at 951. The Court looked back to its earlier decision on jurisdiction-stripping statutes to guide its decision on the jurisdiction-conferring statute at issue. *Id.* It noted that jurisdiction-stripping statutes that merely changed the jurisdiction of the Court to hear the case could be applied retroactively because the statute "takes away no substantive right but simply *changes* the tribunal that is to hear the case." *Id.* And stated, "[p]resent law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Id.*, *quoting Landgraf*, 511 U.S. at 274.

However, the Court noted that "**[s]uch statutes affect only *where* a suit may be brought, not *whether* it may be brought at all.**" *Id.* (emphasis added). The Court then found that the statute in question created jurisdiction where none existed before and held that it therefore had an impermissible retroactive effect because it "speaks not just to the power of a particular court but to the substantive rights of the parties as well." *Id.* The Court held, "[s]uch a statute, even though phrased in jurisdictional terms, is as much subject to our presumption against retroactivity as any other." *Id.*

Recently, in *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006), the Court addressed the issue of whether the provision of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, 2739-44 that deprived the courts of jurisdiction over habeas petitions filed by persons detained at Guantanamo Bay applied to habeas cases pending when it was enacted. Although the Court held that the statute did not apply to pending cases under ordinary principles of statutory construction, it again acknowledged the rule that where a jurisdiction-stripping statute affects the substantive rights of the parties, it will be held to have an impermissible retroactive effect. *Id.* at 577.

In his dissent, Justice Scalia, citing to *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) and *Hughes Aircraft,* argued that the Court had historically drawn a distinction between jurisdiction-conferring statutes and jurisdiction-stripping statutes, stating a

retroactivity analysis should only be applied to the former. *Id.* at 662. The majority declined to follow Justice Scalia's argument and held that no such distinction exists. *Id.* at 583. The Court stated:

> While the Court in both of these cases [*Altmann* and *Hughes Aircraft*] recognized that statutes "creating" jurisdiction may have retroactive effect if they affect "substantive" rights, we have applied the same analysis to statutes that have jurisdiction-stripping effect.

Id. at 583 fn12.

Following the Court's decisions in *U.S. Fidelity* and *Hallowell*, two rules of statutory construction have governed whether jurisdiction-stripping statutes will be construed to have retroactive effect. First, if a jurisdiction-stripping statute merely changes the tribunal which can hear a case, it will be applied to pending cases. *Hallowell*, 239 U.S. at 508. Under these circumstances the statute is deemed to have no retroactive effect because it creates a procedural change that affects only the power of the court, not the rights of the parties. *Landgraf*, 511 U.S. at 274. Conversely, if a jurisdiction-stripping statute removes the jurisdiction of the only forum in which the plaintiff's case can be heard, it will not be applied to pending cases. *Hughes Aircraft*, 520 U.S. at 951. Such a statute is deemed to have retroactive effect because

it affects the substantive right of the party to have their case heard at all. *Id.*; *Hamdan* at 583.[6]

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[6] Iraq erroneously argues that, in *Bruner v. United States*, 343 U.S. 112 (1952), the Court adopted a different rule that all jurisdiction-stripping statutes apply to pending cases regardless of retroactive effect. Iraq's argument is without merit. *Bruner* does not conflict with *U.S. Fidelity* or *Hallowell*. The jurisdiction-stripping statute in question, in *Bruner*, did not divest the plaintiff of the right to bring a cause of action, but merely changed the tribunal that would hear the case from the district courts to the Court of Claims. *Id.* at 117. Citing to *Hallowell*, the Court held: "Congress has not altered the nature or validity of petitioner's rights or the Government's liability but has simply reduced the number of tribunals authorized to hear and determine such rights and liabilities." *Id.* Moreover, the Court noted that its holding was still subject to the rule that a statute having retroactive effect is not to be applied absent an unambiguous directive. *Id.*

The cases cited to by the *Bruner* Court in support of its holding, *Merchants' Insurance Co. v. Ritchie*, 72 U.S. 541 (1866) and *The Assessors v. Osbornes*, 76 U.S. 567 (1869), are also consistent with the rules established in *U.S. Fidelity* and *Hallowell*. Both *Merchants' Insurance* and *The Assessors*, dealt with the question of whether the Internal Revenue Act of 1866, which had repealed a jurisdictional conferring provision of an Act of 1833, applied to strip federal circuit court's jurisdiction in pending cases. 72 U.S. at 543-44; 76 U.S. at 572-73. The Court held, in both cases, that the jurisdiction-stripping Act of 1866 did apply to pending cases. 72 U.S. at 545; 76 U.S. at 575. However, the Act of 1866 did not divest plaintiffs in pending cases of their causes of action, which were still available to them in state courts. 72 U.S. at 543; 76 U.S. at 574. Because the Act of 1866 did not affect the substantive rights of the parties, the Court's decisions, like that in *Hallowell*, do not conflict with the rule established in *U.S. Fidelity* or the traditional presumption against retroactivity. As such, Iraq's contentions are misplaced.

Under Iraq's interpretation of EWSAA § 1503 and NDAA § 1083, these statutes remove the jurisdiction of the only forum in which the Respondents' causes of action against Iraq can be heard. As such, the statutes are jurisdiction-stripping statutes that totally divest the parties of their rights to a substantive cause of action, thereby effectively providing Iraq with complete amnesty for the acts of torture and hostage taking perpetrated under the former regime. It would be absurd to suggest that such a result is merely procedural and does not affect the parties' substantive rights. By denying the Respondents any form of relief, the statutes' impact on the substantive rights of the Respondents and similarly situated parties could not be more profound. Moreover, as the negative legal consequences of Iraq's past actions would be totally obviated, the substantive benefit Iraq would reap from such a construction cannot be ignored. In light of this Court's prior holdings, particularly *U.S. Fidelity* in which it held that a mere delay of a plaintiff's right to bring suit created impermissible retroactive effect, it would be a grave injustice for this Court to hold that the permanent divestiture of the Respondents' rights was not an impermissible retroactive effect. Accordingly, even assuming, *arguendo*, that the statutes provided for the repeal of § 1605(a)(7), the statutes can only be applied prospectively and have no affect on the court's jurisdiction to hear Respondents' cases.

From the foregoing it is evident that Iraq's argument that EWSAA § 1503 and NDAA § 1083 should

be applied retroactively to Respondents' pending actions is unsupported by the plain language of the statutes and the traditional rules of statutory construction. Accordingly, Iraq's unwarranted request for total amnesty for its prior acts of terrorism must be rejected.

II. AS A RESULT OF THE PRESIDENT'S WAIVER OF ALL PROVISIONS OF NDAA § 1083 TOWARD IRAQ, THE REPEAL OF 28 U.S.C. § 1605(a)(7) UNDER § 1083(b) DOES NOT APPLY TO RESPONDENTS' PENDING CASES.

Iraq presents two arguments on appeal. First, that the Court should hold that the President's May 7, 2003 exercise of his EWSAA § 1503 waiver power repealed § 1605(a)(7) jurisdiction retroactively as to pending cases against Iraq. Alternatively, Iraq argues that in the event this Court does not find that the President's § 1503 waiver repealed § 1605(a)(7) jurisdiction, then it should hold that, when NDAA § 1083 was enacted in 2008, that act retroactively divested the courts of § 1605(a)(7) jurisdiction over pending cases. Iraq's argument in the alternative is addressed herein.

Assuming, *arguendo*, that the repeal of § 1605(a)(7) under § 1083(b) applied retroactively to pending cases (which it cannot), the President's waiver of all provisions of § 1083 affecting Iraq, as permitted by § 1083(d), waived the § 1083(b) statutory repeal and restored jurisdiction.

Congress granted the power to the President under § 1083(d) to waive provisions of § 1083 that affect Iraq. *See* § 1083(d)(1). Upon the enactment of the NDAA, the President immediately exercised the § 1083(d) waiver power to the full extent of his authority. *See* Presidential Determination No. 2008-9, 73 Fed. Reg. 6571 (2008) ("I hereby waive all provisions of section 1083 of the Act with respect to Iraq and any agency or instrumentality thereof."). Given the President's categorical exercise of this authority, the § 1083(d) waiver encompassed all provisions of § 1083 that "**affect** Iraq or any agency or instrumentality thereof." *See* § 1083(d)(1).

Iraq argues that the § 1083(b) statutory repeal of § 1605(a)(7) jurisdiction applied retroactively to divest the courts of jurisdiction to hear Respondents' cases. If this is true, the § 1083(b) repeal would affect Iraq because it would release Iraq from its potential liability as a defendant in pending cases. However, if this is true, then it is also true that the President's § 1083(d) waiver of all provisions of § 1083 affecting Iraq would also waive the § 1083(b) repeal of § 1605(a)(7) jurisdiction because it is a provision affecting Iraq.

The Acting Solicitor General has expressed that the foregoing is the position of the United States. *See* Brief of the United States as Amicus Curiae Supporting Reversal ("Brief of the U.S.") at 27 ("The President immediately waived application to Iraq of 'all provisions' of Section 1083 – **necessarily including both its adoption of the new 28 U.S.C. 1605A and**

its repeal of 28 U.S.C. 1605(a)(7) – pursuant to the authority specially granted to the President in response to his withholding of his consent to H.R. 1585.") (emphasis added). The United States provides that prior to the passage of the NDAA, the President was aware that the enactment of § 1083 and the exercise of his authority under § 1083(d) would not affect pending cases. *Id.* It further states that as a compromise to speed the passage of the NDAA, the President specifically agreed with the Members of Congress who were the leading proponents of the NDAA that § 1083 would not affect such pending cases. *Id.*[7]

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[7] The relevant statements of the United States are as follows:

> **Under the compromise, it was understood that the President would exercise his waiver authority under Section 1083(d)(1), and claims against Iraq would be left in the same position as before H.R. 1585 passed Congress.** The NDAA contained hundreds of pages of other time-sensitive national security and defense authorities. The compromise permitted the expeditious passage of the broader NDAA, days after Congress's return following the President's withholding of his approval of H.R. 1585, without the delay that would have accompanied consideration of whether or how to adjust the legal status quo with regard to Iraq. *See* 154 Cong. Rec. E47 (daily ed. Jan. 17, 2008) (statement of Rep. Conyers) (President's exercise of his NDAA waiver authority would not affect "ongoing litigation" regarding the susceptibility of Iraq to suit "under current law").

Brief of the U.S. at 27 (emphasis added).

The United States' characterization of the events leading to the passage of the NDAA are fully supported by the legislative history of § 1083. *See infra* at 30-33. Addressing § 1083(d), Representative John Conyers, Chairman of the House Judiciary Committee, stated the following:

> It is important to note that this change does not affect rights under current law. **The President's waiver authority extends only to the provisions being newly enacted in this bill; by its clear terms, it does not extend to current law. There is ongoing litigation . . . under current law; if the President exercises his new waiver authority, that litigation will proceed unaffected by that waiver.**
>
> The difference is that, if the President exercises the waiver authority, [current plaintiffs] will not be helped by this new provision we wrote and passed, as we wanted them to be, and as they would be absent the waiver.

154 Cong. Rec. E46, 47 (daily ed. Jan. 17, 2008) (statement of Rep. Conyers) (emphasis added).

Under the plain language of § 1083(d) and Presidential Determination No. 2008-9, the President waived the jurisdictional repeal of § 1605(a)(7) in § 1083(b) as to Iraq. Further, as the illuminating statements of the United States have established, the President's waiver of § 1083(b) was intentional and furthered the purpose of rapidly enacting the NDAA. Accordingly, even assuming, *arguendo*, that the

§ 1083(b) jurisdictional repeal of § 1605(a)(7) could have applied retroactively to pending cases (which it could not), it was waived by the President and has no affect on the lower court's jurisdiction to hear Respondents' claims.

III. THE *ACREE* COURT CORRECTLY HELD THAT § 1503 OF THE EWSAA DID NOT PROVIDE THE PRESIDENT WITH THE AUTHORITY TO MAKE § 1605(a)(7) INAPPLICABLE TO IRAQ.

A. Through the enactment of NDAA § 1083(c)(4), Congress confirmed that the D.C. Circuit correctly decided *Acree*.

In NDAA § 1083(c)(4), Congress and the President recognized the propriety of the *Acree* decision by establishing in federal law that EWSAA § 1503 **did not** grant the President the authority to remove the jurisdiction of any court of the United States. Section 1083(c)(4) of H.R. 1585 states:

> **(4) PRESERVING THE JURISDICTION OF THE COURTS. –**
>
> Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

This statute is an explicit and unambiguous expression of congressional intent directed at the resolution of the instant appeal. As such, if it is not deemed to be controlling authority (which given the circumstances it should), it must at the least be accorded to carry great weight as to the decision of this issue. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969).

On January 28, 2008, the National Defense Authorization Act for 2008 ("NDAA II"), H.R. 4986, was signed by the President. *Id.* NDAA II was drafted in response to the President's veto of Congress's initial NDAA for 2008 ("NDAA I"), H.R. 1585, 110th Cong. (2007), which had been passed by an overwhelming majority of Congress in December 2007. The President vetoed NDAA I over provisions in § 1083 directed at enhancing the ability of victims of state sponsored terrorism to recover against defendant states in actions under 28 U.S.C. § 1605, particularly as it applied to Iraq. *Memorandum of Disapproval*, 3 Weekly Comp. Pers. Doc. 1641 (Dec. 28, 2007).

Section 1083, initially titled "Justice for Marines and other Victims of State Sponsored Terrorism," was added to NDAA I by Senate Amendment 2251, on September 26, 2007. This amendment was sponsored by Senator Frank Lautenberg and co-sponsored by twenty Senators, including Senators Specter, Clinton, Dole, Lieberman and Nelson. *See* Library of Congress: Report on Senate Amendment 2251, *at* http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SP02251:. Section 1083 was targeted specifically at addressing decisions

of the D.C. Circuit and tactics being employed by defendant states that Congress considered to impermissibly weaken the ability of plaintiffs to recover under 28 U.S.C. § 1605(a)(7). 154 Cong. Rec. S54-56 (daily ed. Jan. 22, 2008) (statement of Sen. Lautenberg). These tactics and decisions were addressed and disapproved through the revision of § 1605 and the establishment of a new section, 28 U.S.C. § 1605A. This new section, while substantially similar to § 1605, contained among other enhancements, the ability to place liens on a defendant state's assets and the removal of such state's ability to take interlocutory appeals. *Id.* Section 1083, as passed by the Senate and House in H.R. 1585 also contained § 1083(c)(4), a section targeted at Iraq's attempts to have the *Acree* decision reversed. Section 1083(c)(4) provides unequivocally that Congress did not intend § 1503 to authorize the President to remove the jurisdiction of any court of the United States, exactly as the D.C. Circuit held in *Acree*.

Immediately upon reconvening Congress in January 2008, a bipartisan group began negotiating a compromise with the Executive Branch over § 1083. 154 Cong. Rec. S53-54 (daily ed. Jan. 22, 2008) (statement of Sen. Levin). Congress was under considerable pressure to immediately pass NDAA II in order to provide funding for the ongoing actions in Iraq and Afghanistan. *Id.* Against the will of numerous members of Congress, the negotiations resulted in a revision of § 1083 that did not in any way modify NDAA I § 1605A, except to add a new section,

§ 1083(d).[8] *See* 154 Cong. Rec. H257-59 (daily ed. Jan. 16, 2008). As contained in H.R. 4986, § 1083(d) granted the President the authority to waive provisions of § 1605A as they would affect Iraq, subject to certain required presidential determinations.

Of overwhelming significance to the instant action, H.R. 4986 as passed by both houses of Congress and as signed into law by the President includes an unmodified § 1083(c)(4). Section 1083(c)(4) along with § 1083(d) waiver provision were codified as notes to 28 U.S.C. § 1605A and are now in force as binding provisions of federal law.

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[8] Along with other members of Congress, Senate Majority Leader Harry Reid expressed his dissatisfaction with the § 1083 compromise during discussions on the revised NDAA. During the January 22 meeting of the Senate, Senator Reid stated:

> I also want to reiterate that it is my belief that the Government of Iraq should take responsibility for what has taken place there in years past, including the brutal torture of American POWs. **Congress has gone on record repeatedly – most recently, in overwhelmingly passing section 1083 of the conference report to H.R. 1585 last year in both the House and Senate and sending it to the President – to support the efforts of these Americans who have suffered so much for their country to hold the torturers accountable.** This administration has been fighting for years to oppose efforts to win compensation for these soldiers, which is, frankly, a disgrace.

154 Cong. Rec. S57 (daily ed. Jan. 22, 2008) (emphasis added).

It is a longstanding principle of English and American jurisprudence that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Red Lion*, 395 U.S. at 380-81; *accord Glidden Co. v. Zdanok*, 370 U.S. 530, 541 (1962) ("Especially is this so when the Congress has been stimulated by decisions of this Court to investigate the historical materials involved and has drawn from them a contrary conclusion."); *accord Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84, 90 (1959) ("later law is entitled to weight when it comes to the problem of construction"). The weight of such legislation is particularly great "when the precise intent of the enacting Congress is obscure." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 598 (1980).

Section 1083(c)(4), was passed by Congress only five years after the EWSAA was enacted with a majority of its membership still intact.[9] It is not merely a statute that suggests the intent of Congress indirectly, but is rather an explicit unambiguous statement targeted directly at the resolution of the

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[9] *Compare* Senate Roll Call Votes for S.1689 (EWSAA 2003) April 3, 2003, *at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=108&session=1&vote=00400; *with* Senate Roll Call Votes for H.R.4986 (NDAA 2008), *at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=2&vote=00001. *Compare* House Roll Call Votes for H.R.1559 (EWSAA 2003), http://clerk.house.gov/evs/2003/roll108.xml; *with* House Roll Call Votes for H.R.4986 (NDAA 2008), *at* http://clerk.house.gov/evs/2008/roll011.xml.

precise question presented to this Court. Under these circumstances, the congressional intent expressed in § 1083(c)(4) should not only be given great weight, but should be deemed controlling. *F.T.C. v. Jantzen, Inc.*, 386 U.S. 228, 235 (1967) ("The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed."), *quoting Johnson v. U.S.*, 163 F. 30 (1st Cir. 1908); *U.S. v. Hutcheson*, 312 U.S. 219, 235 (1941).

Iraq attempts to marginalize the significance of § 1083(c)(4) by stating that it is legislative history created by a later Congress and therefore to be accorded little weight. It supports this characterization by citation to inapposite cases dealing with true legislative history or expressions of congressional intent far removed from the date the original statute was enacted. *See Rainwater v. U.S.*, 356 U.S. 590, 593 (1958) (more than fifty years passed between enactment of original statute and later amendment interpreting statute); *see Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839-40 (1988) (amendment occurred ten years after enactment of original statute); *see U.S. v. Monsanto*, 491 U.S. 600, 610 (1989) (post-enactment comments of three legislators in congressional record); *see South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355-56 (1998) (various references in congressional record some as much as one hundred years after the passage of the original statute). The statute in question is not mere legislative history, such as the comments in *Monsanto*

or *Yankton Sioux*, but is legislation itself. And it was not enacted by a Congress far removed from the one that passed the original statute, such as in *Rainwater* and *Mackey*. Iraq ignores the facts that at the time NDAA § 1083(c)(4) was passed the membership of Congress had changed relatively little since the 108th Congress had passed the EWSAA, and that President Bush had not yet left office. Under these circumstances, Iraq's argument that § 1083(c)(4) bears little relevance cannot be accepted.

Iraq also argues that even if § 1083(c)(4) is controlling, the President waived § 1083(c)(4) when he categorically exercised his § 1083(d) waiver power. While it is true that the President categorically waived all provisions of § 1083 as to Iraq, Iraq's argument is unavailing as § 1083(c)(4) is not standard legislation that confers rights or limits actions, rather it is a statement of fact. A fact is an "actual or alleged event or circumstance, as distinguished from its legal effect, consequence, or interpretation." BLACK'S LAW DICTIONARY (8th ed. 2004), fact. To state that the President ordered the waiver of the existence of a fact for the purposes of a legal proceeding is akin to stating that the President can order the judiciary to ignore truth and reality. Such an argument is repugnant to the basic principles of justice upon which our system of government is based and should be rejected accordingly.

It is clear that because NDAA § 1083(c)(4) was passed shortly after the enactment of EWSAA § 1503 and is federal law targeted directly at the resolution

of the question presented in the instant case, it should be accorded great weight in answering the question presented.

B. The *Acree* Court's holding was consistent with the congressional purpose of EWSAA § 1503 and the context of the proviso within the statute.

Iraq argues that the waiver proviso of EWSAA § 1503 should be construed only by examining the language of the proviso itself, ignoring the EWSAA's legislative history and its context in the statute as a whole. Iraq argues that it was error for the *Acree* Court to do otherwise. Iraq's argument is without merit. Because the statutory language in question was couched as a proviso to a principal clause and the construction urged by Iraq was a jurisdictional repeal by implication, under the traditional rules of statutory interpretation, the *Acree* Court was required to look beyond the language of the proviso.

i. The Historical Context of EWSAA § 1503

Following Iraq's invasion and occupation of Kuwait in August of 1990, Congress designated Iraq as a state sponsor of terrorism and passed several statutes that sanctioned the Iraqi government. *See* Presidential Determination No. 2004-52, 69 Fed. Reg. 58793 (September 24, 2004). Principal among these statutes was the Iraq Sanctions Act of 1990 ("ISA"),

which established a comprehensive trade embargo and increased penalties for violating other trade restrictions. *See* Pub. L. No. 101-513, §§ 586-586J, 104 Stat. 1979, 2047-55 (1990). In addition to its own restrictions, ISA § 586F(c) also limited the economic aid that could be provided to Iraq by requiring that § 620A of the Foreign Assistance Act of 1961 ("FAA"), added by Pub. L. No. 94-329, § 303 (1976), be enforced against it. FAA § 620A prohibits the provision of economic assistance to any country determined by the Secretary of State to have repeatedly provided support for acts of international terrorism. 22 U.S.C. § 2371.

In 2003, after the United States led coalition invasion of Iraq had succeeded in ousting the Saddam Hussein regime, the nation's foreign policy toward Iraq drastically changed. Congress wanted to quickly free up aid to assist Iraqi citizens affected by the war and to reconstruct Iraq's infrastructure. Problematically, Iraq's designation under the ISA and FAA could only be removed through a certification process in which the President presented certain findings to Congress regarding the government of Iraq. *See* ISA § 586H, 104 Stat. 1979, 2052-53; FAA, 22 U.S.C. § 2371(c). Iraq's designation as a state sponsor of terrorism could also only be removed by a similar certification carried out by the Secretary of State. *See* 50 U.S.C.App. § 2405(j)(4). Because there was no government in place in Iraq at that time, the certification process could not proceed under the statutes.

In response to this problem, in April 2003, Congress included in the Emergency Wartime Supplemental Appropriations Act, which provided funding for the military operations in Iraq and Afghanistan, a section that authorized an expedited means of removing Iraq's designations under the ISA and FAA. Pub. L. No. 108-11, § 1503, 117 Stat. 559 (2003). EWSAA § 1503 provided the President with the authority to "suspend the application of any provision of the Iraq Sanctions Act of 1990." As one of several provisos to the President's authority, § 1503 "[p]rovided further, [t]hat the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism."

On May 7, 2003, in Presidential Determination No. 2003-23, President Bush exercised his authority under EWSAA § 1503. Presidential Determination No. 2003-23 states in pertinent part:

> I hereby:
>
> (1) suspend the application of all of the provisions, other than section 586E, of the Iraq Sanctions Act of 1990, Public Law 101-513, and
>
> (2) make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, Public Law 87-195, as amended (the "FAA"), and any other provision of law that applies to countries that have supported terrorism.

On May 22, 2003, the President in a message to Congress stated his belief that the § 1503 waiver power he had exercised on May 7, 2003, had encompassed the terrorism exception to the FISA, 28 U.S.C. § 1605(a)(7). *See Message to the Congress*, 39 Weekly Comp. Pres. Doc. 647 (May 22, 2003).

Shortly thereafter, the D.C. Circuit, in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), was presented with the question of whether the President's waiver had in fact applied to strip the federal courts of § 1605(a)(7) jurisdiction. The D.C. Circuit held that the authority granted to the President under EWSAA § 1503 to make certain laws inapplicable to Iraq did not by implication include the authority to strip the federal courts of § 1605(a)(7) jurisdiction. *Id.* at 43. In arriving at this holding the Court carefully examined the waiver proviso in light of the circumstances surrounding its passage and its context within the statute. *Id.* at 52-58.

ii. The Propriety of the *Acree* Decision

In *Acree*, Iraq argued as it does here that the language "any other provision of law that applies to countries that have supported terrorism" should be construed independently of the statute as a whole and its legislative history. *Id.* at 52. Iraq's argument for a limited reading of the proviso must be rejected, because the language is couched as a proviso and Iraq seeks to have the language construed as a repeal by implication. To do otherwise would be a blind

approval of a repeal by implication, an intensely disfavored construction, and a rejection of the traditional rules that (1) provisos must be read in context and (2) that legislative intent must be clear and manifest for a repeal by implication. *See TVA v. Hill*, 437 U.S. 153, 189-90 (1978) (holding repeals by implication are intensely disfavored in appropriations acts and requiring "that 'the intention of the legislature to repeal must be clear and manifest'" for such a finding), *quoting Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936).

Because EWSAA § 1503 does not explicitly provide for the repeal of § 1605(a)(7), the repeal urged by Iraq is a repeal by implication. *See Rodriguez v. U.S.*, 480 U.S. 522, 524 (1987) ("Since § 3147 does not explicitly divest sentencing judges of their authority under § 3651, the Court of Appeals' judgment amounts to the conclusion that § 3147 is an implicit partial repeal of § 3651.").

"It is well settled . . . that repeals by implication are not favored, and will not be found unless an intent to repeal is 'clear and manifest.'" *Rodriguez*, 480 U.S. at 524 (internal citations omitted). "A law is not to be construed as impliedly repealing a prior law unless no other reasonable construction can be applied." *U.S. v. Jackson*, 302 U.S. 628, 631 (1938). "The principle carries special weight when we are urged to find that a specific statute has been repealed by a more general one." *U.S. v. United Cont'l Tuna Corp.*, 425 U.S. 164, 169 (1976). "[T]he policy applies with even greater force when the claimed repeal rests

solely on an Appropriations Act." *TVA*, 437 U.S. at 190. *See TVA v. Hill*, 437 U.S. at 189-90. As such, courts are required to find that the intent of Congress is clear and manifest to declare such a construction. *Id.*

Accordingly, under the traditional rules of construction, the *Acree* Court was required to determine whether it was the clear intent of Congress to repeal § 1605(a)(7) by implication. Such an analysis, cannot be undertaken by looking only at the language of the proviso devoid of its context. As described above, their was no mention in the legislative history of § 1605(a)(7) and the removal of § 1605(a)(7) was not necessary to accomplish the goal of Congress which was to repeal the ISA and free up aid to Iraq. As such, there was no evidence of the intent of Congress to authorize a repeal by implication. The *Acree* Court's analysis was therefore both necessary and correct.

Further, it is undeniable that the language at issue is in the context of a proviso. As such, the doctrines applicable to the construction of a proviso must be applied. It is a traditional presumption that "a proviso 'refers only to the provision to which it is attached.'" *U.S. v. McClure*, 305 U.S. 472, 478 (1939); *U.S. v. Morrow*, 266 U.S. 531, 535 (1925). "The general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality and prevent misinterpretation. Its grammatical and logical scope is confined to the subject-matter of the principal clause." *Morrow*, 266 U.S. at 534-35. Because the provision at issue is a proviso, the *Acree* Court appropriately applied "the cardinal rule that a

statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *Acree*, 370 F.3d at 52, *quoting King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991).

Under these traditional rules, the *Acree* Court correctly held that the proviso was limited by its context to apply only as a measure to free up aid to Iraq. None of the other language in the statute was related to achieving any purpose other than that of the principal clause, which was to provide the President with the ability to effectively "suspend the Iraq Sanction Act of 1990."

From the foregoing, it is clear that because the language of the President's waiver power was couched as a proviso and that the construction sought by Iraq was a repeal by implication, the *Acree* Court was correct to look beyond the language of the proviso. Further, the limited focus of the statute and the total absence of any discussion in the legislative history of foreign sovereign immunity or § 1605(a)(7) could only lead to the *Acree* Court's conclusion that congressional intent was not sufficiently clear to warrant such a repeal. *See Acree*, 370 F.3d at 424-25; *see TVA*, 437 U.S. at 190; *see St. Cyr*, 533 U.S. at 320 fn44 ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in

the night.") (*quoting Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting).

CONCLUSION

For the reasons stated herein, the Respondents respectfully request that this Court affirm the District Court and the Circuit Court in all respects.

Respectfully submitted,

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Emergency Wartime Supplemental Authorization Act, 2003, Pub. L. No. 108-011, § 1503, 117 Stat. 559, 579 (2003)

SEC. 1503. The President may suspend the application of any provision of the Iraq Sanctions Act of 1990: *Provided*, That nothing in this section shall affect the applicability of the Iran-Iraq Arms Non-Proliferation Act of 1992 (Public Law 102-484), except that such Act shall not apply to humanitarian assistance and supplies: *Provided further*, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism: *Provided further*, That military equipment, as defined by title XVI, section 1608(1)(A) of Public Law 102-484, shall not be exported under the authority of this section: *Provided further*, That section 307 of the Foreign Assistance Act of 1961 shall not apply with respect to programs of international organizations for Iraq: *Provided further*, That provisions of law that direct the United States Government to vote against or oppose loans or other uses of funds, including for financial or technical assistance, in international financial institutions for Iraq shall not be construed as applying to Iraq: *Provided further*, That the President shall submit a notification 5 days prior to exercising any of the authorities described in this section to the committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the

House of Representatives: *Provided further*, That not more than 60 days after enactment of this Act and every 90 days thereafter the President shall submit a report to the Committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives containing a summary of all licenses approved for export to Iraq of any item on the Commerce Control List contained in the Export Administration Regulations, 15 CFR Part 774, Supplement 1, including identification of end users of such items: *Provided further*, That the authorities contained in this section shall expire on September 30, 2004, or on the date of enactment of a subsequent Act authorizing assistance for Iraq and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first.

National Defense Authorization Act for Fiscal Year 2008, Public Law No. 110-181

SEC. 1083. TERRORISM EXCEPTION TO IMMUNITY.

(a) TERRORISM EXCEPTION TO IMMUNITY. –

(1) IN GENERAL. – Chapter 97 of title 28, United States Code, is amended by inserting after section 1605 the following:

§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL. –

(1) NO IMMUNITY. – A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD. – The court shall hear a claim under this section if –

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a

result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred –

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought,

the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS. – An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of –

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION. – A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to –

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3), for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES. – After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS. –

(1) IN GENERAL. – The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS. – The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act

of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL. – In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION. –

(1) IN GENERAL. – In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is –

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE. – A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY. – Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS. – For purposes of this section –

(1) the term 'aircraft sabotage' has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term 'hostage taking' has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term 'material support or resources' has the meaning given that term in section 2339A of title 18;

(4) the term 'armed forces' has the meaning given that term in section 101 of title 10;

(5) the term 'national of the United States' has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term 'state sponsor of terrorism' means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of

the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms 'torture' and 'extrajudicial killing' have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).".

(2) AMENDMENT TO CHAPTER ANALYSIS. – The table of sections at the beginning of chapter 97 of title 28, United States Code, is amended by inserting after the item relating to section 1605 the following:

1605A. Terrorism exception to the jurisdictional immunity of a foreign state.".

(b) CONFORMING AMENDMENTS. –

(1) GENERAL EXCEPTION. – Section 1605 of title 28, United States Code, is amended –

(A) in subsection (a) –

(i) in paragraph (5)(B), by inserting "or" after the semicolon;

(ii) in paragraph (6)(D), by striking "; or" and inserting a period; and

(iii) by striking paragraph (7);

(B) by repealing subsections (e) and (f); and

(C) in subsection (g)(1)(A), by striking "but for subsection (a)(7)" and inserting "but for section 1605A".

(2) COUNTERCLAIMS. – Section 1607(a) of title 28, United States Code, is amended by inserting "or 1605A" after "1605".

(3) PROPERTY. – Section 1610 of title 28, United States Code, is amended –

(A) in subsection (a)(7), by striking "1605(a)(7)" and inserting "1605A";

(B) in subsection (b)(2), by striking "(5), or (7), or 1605(b)" and inserting "or (5), 1605(b), or 1605A";

(C) in subsection (f), in paragraphs (1)(A) and (2)(A), by inserting "(as in effect before the enactment of section 1605A) or section 1605A" after "1605(a)(7)"; and

(D) by adding at the end the following:

(g) PROPERTY IN CERTAIN ACTIONS. –

(1) IN GENERAL. – Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of –

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE. – Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) THIRD-PARTY JOINT PROPERTY HOLDERS. – Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.".

(4) VICTIMS OF CRIME ACT. – Section 1404C(a)(3) of the Victims of Crime Act of 1984 (42 U.S.C. 10603c(a)(3)) is amended by striking "December 21, 1988 with respect to which an investigation or" and inserting "October 23, 1983, with respect to which an investigation or civil or criminal".

(c) APPLICATION TO PENDING CASES. –

(1) IN GENERAL. – The amendments made by this section shall apply to any claim arising under section 1605A of title 28, United States Code.

(2) PRIOR ACTIONS. –

(A) IN GENERAL. – With respect to any action that –

(i) was brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), before the date of the enactment of this Act,

(ii) relied upon either such provision as creating a cause of action,

(iii) has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action against the state, and

(iv) as of such date of enactment, is before the courts in any form, including on appeal or motion under rule 60(b) of the Federal Rules of Civil Procedure, that action, and any judgment in the action shall, on

motion made by plaintiffs to the United States district court where the action was initially brought, or judgment in the action was initially entered, be given effect as if the action had originally been filed under section 1605A(c) of title 28, United States Code.

(B) DEFENSES WAIVED. – The defenses of res judicata, collateral estoppel, and limitation period are waived –

(i) in any action with respect to which a motion is made under subparagraph (A), or

(ii) in any action that was originally brought, before the date of the enactment of this Act, under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), and is refiled under section 1605A(c) of title 28, United States Code, to the extent such defenses are based on the claim in the action.

(C) TIME LIMITATIONS. – A motion may be made or an action may be refiled under subparagraph (A) only –

(i) if the original action was commenced not later than the latter of –

(I) 10 years after April 24, 1996; or

(II) 10 years after the cause of action arose; and

(ii) within the 60-day period beginning on the date of the enactment of this Act.

(3) RELATED ACTIONS. – If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), any other action arising out of the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after –

(A) the date of the entry of judgment in the original action; or

(B) the date of the enactment of this Act.

(4) PRESERVING THE JURISDICTION OF THE COURTS. – Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

(d) APPLICABILITY TO IRAQ. –

(1) APPLICABILITY. – The President may waive any provision of this section with respect to Iraq, insofar as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof, if the President determines that –

(A) the waiver is in the national security interest of the United States;

(B) the waiver will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq; and

(C) Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.

(2) TEMPORAL SCOPE. – The authority under paragraph (1) shall apply –

(A) with respect to any conduct or event occurring before or on the date of the enactment of this Act;

(B) with respect to any conduct or event occurring before or on the date of the exercise of that authority; and

(C) regardless of whether, or the extent to which, the exercise of that authority affects any action filed before, on, or after the date of the exercise of that authority or of the enactment of this Act.

(3) NOTIFICATION TO CONGRESS. – A waiver by the President under paragraph (1) shall cease to be effective 30 days after it is made unless the President has notified Congress in writing of the basis for the waiver as determined by the President under paragraph (1).

(4) SENSE OF CONGRESS. – It is the sense of the Congress that the President, acting through the Secretary of State, should work with the Government

of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime against individuals who were United States nationals or members of the United States Armed Forces at the time of those terrorist acts and whose claims cannot be addressed in courts in the United States due to the exercise of the waiver authority under paragraph (1).

(e) SEVERABILITY. – If any provision of this section or the amendments made by this section, or the application of such provision to any person or circumstance, is held invalid, the remainder of this section and such amendments, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.

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28 U.S.C. § 1605(a)(7) (2000)

Sec. 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

* * *

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph –

> (A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if –

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

Nos. 07-1090 & 08-539

FILED
MAR 18 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

REPUBLIC OF IRAQ, PETITIONER,

v.

JORDAN BEATY, ET AL., RESPONDENTS.

REPUBLIC OF IRAQ, ET AL., PETITIONERS,

v.

ROBERT SIMON, ET AL., RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether Iraq is subject to the jurisdiction of the courts of the United States for torturing U.S. soldiers and civilians.

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	Abbreviated Herein As
Foreign Assistance Act of 1961	FAA
Iraq Sanctions Act of 1990	ISA
Emergency Wartime Supplemental Appropriations Act of 2003	EWSAA
National Defense Authorization Act for Fiscal Year 2008	NDAA
Foreign Sovereign Immunities Act	FSIA
Prisoners of War	POWs

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STATEMENT OF THE CASE

On August 2, 1990, Iraq, led by Saddam Hussein, invaded and occupied Kuwait. The U.S. Department of State designated Iraq a state sponsor of terrorism on September 13, 1990.[1] On January 16, 1991, following U.N. Security Council authorization, an international coalition of 33 nations went to war to force Iraq out of Kuwait. During this conflict, the Iraqi military captured and tortured Robert Simon, Roberto Alvarez, Nabil Seyam, and the 17 American military personnel named as plaintiffs in *Acree v. Republic of Iraq* ("*Acree*"). Theirs are among the very few remaining cases against Iraq.[2]

A. The Plaintiffs

1. Bob Simon and Roberto Alvarez

CBS News reporter Bob Simon and CBS News cameraman Roberto Alvarez were kidnapped on January 21, 1991, while filming on the border of Saudi Arabia and Kuwait. Petitioners tortured Simon and Alvarez alongside the American POWs of the *Acree* case. They were subjected to beatings with rifles, clubs, fists, and boots; starvation; and confinement in near-total darkness. The Iraqis made Simon and Alvarez believe they would be beheaded or hanged, just as others before them. On one occasion, an Iraqi military officer forced Simon's jaw open, spat down his throat, and shouted "Yahoudi" (Arabic for "Jew").

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[1] *See* Department of State—Determination Iraq, 55 Fed. Reg. 37,793 (Sept. 13, 1990); 15 C.F.R. §746.3(b) (2006).

[2] *See* Br. for Pet'rs at 9 n.3.

As "human shields," they were inside an Iraqi Intelligence Service building which collapsed around them when it was hit by four 2,000-pound bombs dropped by Coalition forces. While held hostage they were never permitted to notify their families that they were alive. A Miami newspaper reported that they had been executed, furthering the pain of their families.

2. Nabil Seyam

Nabil Seyam, a safety engineer, hid from Iraqi forces for two months before being taken hostage. Because Seyam (now deceased) was an Arab-American, his interrogators gave him the opportunity—with a gun to his forehead—to renounce on television his U.S. citizenship in exchange for being reunited with his family. He refused—and was tortured. Once in Baghdad, Seyam was placed in a bombing target—a hotel converted to Iraqi military quarters—to be used as a "human shield." More than a decade later, living in Wichita, Kansas, he continued to suffer paralyzing headaches and reoccurring pain in his genitals. Tormented by phantoms, Seyam often woke from recurring nightmares of his beatings and humiliations to find himself alone in the darkness of his room, striking out against aggressors who were not there.

3. The *Acree* Plaintiffs

The Iraqi military captured 21 American servicemen, including these 17 POWs. The torture began immediately, and the beatings were incessant. Blindfolded for their interrogations, isolated in darkened

cells, they saw little and could hear nothing, save the screams of their fellow prisoners. The torture included beatings, electric shocks, burns, whippings, starvation (save for eating urine-soaked bread and their own scabs), severe cold and filth, genital inspections to identify Jews, mock executions with pistols to their heads, and threatened castration and dismemberment. Iraq also used the POWs as "human shields".

Once home, all went back into active duty, but their ordeal shadowed them, with some reacting violently to noises, lights, balloons popping, doors slamming, the crack of ice cubes melting, or their children playing. Not the least of their suffering was putting their families through their long-term mental and physical recovery.

B. The *Acree* Litigation

On July 7, 2003, the district court found the Republic of Iraq, Saddam Hussein, and the Iraqi Intelligence Service liable to the *Acree* plaintiffs. *Acree v. Republic of Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003), *vacated*, 370 F.3d 41 (D.C. Cir. 2004).

The United States moved to intervene and vacate the judgment, claiming that the court's jurisdiction had been revoked in May 2003, pursuant to authority allegedly conferred upon the President in §1503 of the April 16, 2003 Emergency Wartime Supplemental Appropriations Act ("EWSAA").[3] The district court denied the United States' motion. *Acree v. Republic of Iraq*, 276 F. Supp. 2d 95, 102 (D.D.C. 2003), *rev'd*, 370 F.3d 41 (D.C. Cir. 2004).

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[3] Pub. L. No. 108-11, 117 Stat. 559, 579 (2003).

In connection with the EWSAA, on May 2, 2003, the President sent notification to Congress of his intent to invoke §1503. He then exercised his §1503 authority in a May 7, 2003 Determination, simply repeating the text of the section.[4] Only later, on May 22, 2003, in a letter to Congress, did the President assert that §1503 abrogated with respect to Iraq §1605(a)(7) of the Foreign Sovereign Immunities Act ("FSIA").[5]

Following the district court's denial of its motion to intervene in *Acree*, the United States appealed. The court of appeals ruled that §1503 of the EWSAA did not affect the jurisdiction of the courts over cases against Iraq under the FSIA's terrorism exception to immunity. *See Acree v. Republic of Iraq*, 370 F.3d 41, 57 (D.C. Cir. 2004).

C. The *Simon* and *Seyam* Litigation

The *Simon* and *Seyam* plaintiffs filed their actions on March 18, 2003, and April 15, 2003, respectively. The cases were dismissed.

The court of appeals reversed and remanded the *Simon* and *Seyam* cases, ruling that the President's waiver of §1083 of the National Defense Authorization Act for Fiscal Year 2008 ("NDAA")[6] for claims against Iraq did not divest the courts of jurisdiction over cases which were pending under §1605(a)(7) of the FSIA when the NDAA went into effect. *Simon v. Republic of Iraq*, 529 F.3d 1187, 1194 (D.C. Cir. 2008).

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[4] J.A. 396–97.

[5] J.A. 402–04.

[6] 122 Stat. 3 (2008) (to be codified at 28 U.S.C. §1605A).

D. The Relevant Statutes

1. The Iraq Sanctions Act of 1990

On September 13, 1990, the Secretary of State designated Iraq as a state sponsor of terrorism.[7] As a result, Iraq was made subject to the sanctions that apply to countries on the State Department list of state sponsors of terrorism. Two months later, Congress enacted the Iraq Sanctions Act of 1990 ("ISA").[8] That act consolidated and codified *preexisting* sanctions against Iraq imposed by other statutes and executive orders, and detailed the penalties for violating those already extant sanctions and embargoes.[9]

2. Section 1503 of the EWSAA (App. C)

Section 1503 of the EWSAA, passed by Congress in April 2003, before the United States took control of Baghdad, authorized President Bush to suspend the application of any provision of the ISA, subject to eight provisos. *See* EWSAA §1503, 117 Stat. 579. Provisos six through eight are purely procedural.[10] *Proviso eight*, for

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[7] *See supra* note 1.

[8] Pub. L. No. 101-513, 104 Stat. 1979, 2047 (1990).

[9] *See id.*; Exec. Order No. 12722, 55 Fed. Reg. 31,803 (Aug. 3, 1990); Exec. Order No. 12724, 55 Fed. Reg. 33,089 (Aug. 13, 1990); *see also* Kenneth Katzman, *Iraq: Post-Saddam Governance and Security*, CRS Rept. for Cong. No. RL31339, at 25 (Feb. 5, 2009) (the ISA "reinforced" Executive Orders 12722 and 12724), *available at* http://opencrs.com/.

[10] *See* App. C at 13a (Guide to EWSAA §1503).

example, referred to as the sunset proviso, provided for the expiration of the authorities granted in §1503 "on September 30, 2004, or on the date of enactment of a subsequent Act *authorizing assistance for Iraq* and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first." EWSAA §1503, 117 Stat. 579 (emphasis added).

Each of the remaining five provisos mirrored a specific portion of the ISA and either: made exceptions to §1503's grant of presidential authority; immediately suspended specific provisions of the ISA; or clarified the President's authority to suspend §620A[11] of the Foreign Assistance Act of 1961 ("FAA").[12]

Of those remaining five provisos, the first and third provisos made exceptions to the grant of authority provided in §1503:

The *first proviso* mandates that nothing in §1503 shall "affect the applicability of the Iran-Iraq Arms Non-Proliferation Act of 1992...."[13] Section 1603 of the Non-Proliferation Act, entitled "Application to Iran of Certain

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[11] Section 620A of the FAA prohibits U.S. assistance from being provided via the FAA, as well as three other statutes, to nations that have been placed on the Secretary of State's list of state sponsors of terrorism. This prohibition prevents most, if not all, of U.S. foreign aid from reaching listed governments. Foreign Assistance Act of 1961, Pub. L. No. 976-195, 72 Stat. 424 (codified at 22 U.S.C. §§2151 *et seq.*).

[12] *Acree*, 370 F.3d at 53. *See* App. C at 13a (Guide to EWSAA §1503).

[13] *See* EWSAA §1503, 117 Stat. 579.

Iraq Sanctions," incorporates by reference paragraphs (1) through (4) of §586G(a) of the ISA.[14] Accordingly, absent this proviso, had President Bush waived the ISA in its entirety, he would have waived these sanctions against Iran, and §1603 would no longer incorporate, against Iran, ISA sanctions that applied to Iraq.

Proviso three mandated that military equipment "shall not be exported under the authority of this section."[15] Like proviso one, proviso three prevents the President from waiving the ISA in its entirety by expressly preserving the portions of §586G(a) of the ISA that prevent the exportation of military equipment.

Provisos four and *five* immediately suspended provisions of the ISA without any action by the President. These provisos demonstrate the fast-approaching need addressed by §1503: to provide emergency economic assistance to war-torn Iraq at the moment the President deemed appropriate.

Proviso four immediately suspended §307 of the FAA "with respect to programs of international organizations for Iraq...."[16] Section 307 of the FAA prevents monies appropriated under Chapter 3 of that Act from being used to fund programs of international organizations benefiting governments out of favor with

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[14] *See* Iran-Iraq Arms Non-Proliferation Act of 1992, Pub. L. No. 102-484, §1603, 106 Stat. 2315 (codified at 50 U.S.C. §1701 note (2000)).

[15] EWSAA §1503, 117 Stat. 579.

[16] *Id.*

the United States.[17] By inserting proviso four into §1503, Congress ensured that the United States could provide funding for international aid organizations in Iraq unimpeded by §307 of the FAA upon suspension of §620A of the FAA.

Proviso five immediately suspended "provisions of law that direct[ed] the United States Government to vote against...loans...to Iraq."[18] Proviso five is responsive to §586G(a)(5) of the ISA, which directs the United States to "oppose any loan or financial or technical assistance to Iraq by international financial institutions in accordance with §701 of the International Financial Institutions Act (22 U.S.C. 262d)."[19]

Proviso two, like the other provisos listed beneath the enacting clause of §1503, clarified the President's authority with regard to suspension of provisions of the ISA. *See infra* Section I.A.

3. Section 1083 of the NDAA

On December 14, 2007, Congress passed H.R. 1585, 110th Cong. (2007), titled the National Defense Authorization Act for Fiscal Year 2008 (the "original Act"). In §1083 of the original Act, Congress amended §1605 of the FSIA to enhance certain rights of plaintiffs

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[17] At the time of Iraq's addition to the list, those governments expressly ineligible for benefits under FAA §307 included: Burma, Iraq, North Korea, Syria, Libya, Iran, Cuba, and the Palestine Liberation Organization.

[18] EWSAA §1503, 117 Stat. 579.

[19] ISA §586G(a)(5), 104 Stat. 2052.

suing foreign terrorist states and to clarify the applicable statute of limitations.

Following its passage by Congress, the original Act was sent to the President. On December 28, 2007, the President, bowing to pressure from Iraq,[20] issued a "Memorandum of Disapproval" (rather than the formal, sealed "Veto Message" that accompanies a return veto) announcing that he was exercising a "pocket veto" over the bill.[21] At the same time, the President sent the original Act back to the House declaring that, in the event the pocket veto was subsequently determined to be ineffective, he intended to exercise a "return veto."[22]

On January 22, 2008, Congress passed a revised version of the original Act. The revised National Defense Authorization Act for Fiscal Year 2008 ("NDAA") retained the earlier version of §1083 in its entirety, the only difference being that the revised NDAA gave the President the authority to waive, with respect to Iraq only, the supplemental rights conferred in §1083, *i.e.*, those making it easier to sue terrorist states and to attach property.

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[20] "Only after lawyers for the Iraqi government threatened to withdraw $25 billion worth of assets from U.S. capital markets early this week did the White House decide to let the bill die...." Josh Rogin, *At Iraq's Urging, Bush Pocket-Vetoes Defense Authorization Bill*, CQ Today – Defense (Dec. 28, 2007), *available at* http://public.cq.com/docs/cqt/news110-000002650500.html. This undermines Iraq's claim that the President vetoed the NDAA because §1083(c)(4) cast doubt on any prior exercise of foreign policy authority. Br. for Pet'rs at 37.

[21] J.A. 411–14.

[22] *See id.*

On January 23, 2008, Respondents (the *Simon/Seyam* plaintiffs) filed a motion at the court of appeals arguing that the President's "hybrid veto" of the original Act was unconstitutional and that consequently, the original Act had become law on December 31, 2007—11 days after presentment.

The President signed the revised NDAA on January 28, 2008, and on that same day, he made the findings which Congress required as a condition of exercising the waiver of §1083's supplemental rights as applied to Iraq.

4. The Foreign Assistance Act of 1961

The Foreign Assistance Act of 1961 ("FAA") organized already existing U.S. aid initiatives, including the economic and technical assistance functions of the International Cooperation Agency, the loan functions of the Development Loan Fund, the currency functions of the Export-Import Bank, and the agricultural functions of the Food for Peace program.[23] The FAA remains the seminal channel of U.S. foreign aid.

Section 620A of the FAA prohibits assistance under the FAA and three related acts to any country listed by the Secretary of State as repeatedly providing support for acts of international terrorism.

Section 307 of the FAA withholds the United States' share of funding for programs of international organizations which benefit governments identified in the section as out of favor with the United States.

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[23] http://www.usaid.gov/about_usaid/usaidhist.html.

SUMMARY OF THE ARGUMENT

The statutes listed in §620A(a) of the FAA provide the plain meaning of the second proviso of the EWSAA. That plain meaning, along with the sunset clause of the EWSAA, compel the conclusion that the federal courts retain jurisdiction pursuant to §1605(a)(7). This is confirmed by the conventions and presumptions of statutory construction as well as the legislative history of the EWSAA. The NDAA had no effect on this.

ARGUMENT

I. Congress Did Not In Proviso Two Of §1503 Of The EWSAA Give The President The Authority To Repeal Federal Jurisdiction Under §1605(a)(7) Of The FSIA.

Though the Petitioners rest their argument on the plain meaning of the second proviso of §1503 of the EWSAA, nowhere do Petitioners articulate what that meaning is. *See* Br. for Pet'rs at 22–28 ("Iraq Br."). The United States, on the other hand, does venture a definition of the proviso's plain meaning—"That provision unambiguously authorized the President to render inoperative as to Iraq any and all laws that apply specifically to countries designated as state sponsors of terrorism."[24]—but this is a false plain meaning, for it reads into the proviso something which is not in the language itself: the narrowing idea that the statutes must expressly refer to nations that have been designated as terrorist states.

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[24] Br. for the United States as *Amicus Curiae* at 11 ("U.S. Br.").

What follows is an explication of the unacceptable failings which beset the government's false plain meaning. We shall then set forth the only acceptable plain meaning of the second proviso of §1503 of the EWSAA, a construction which excludes §1605(a)(7) of the FSIA. Throughout this, the Court should remain aware that the Petitioners have refused to offer a definition of the statute's plain meaning.

Even under the government's constricted reading, it is unclear whether the government means statutes which refer to "terrorism" and have a collateral effect on the countries which support it, or whether its reading is further limited to laws which expressly mention "countries which have been designated [by the Secretary of State] as terrorist states." Finally, the government does not indicate whether its definition reaches state and local statutes and international treaties, as well as federal statutes. Congress, it need be added, knows how to use more exact language along the lines of the United States' construction.[25]

The second proviso, when scraped of exogenous implications, becomes, in its literal reading, absurdly vague, including all statutes of general application (state

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[25] *See, e.g.*, 25 U.S.C. §703(a) (2006) ("all statutes of the United States which affect Indians because of their status as Indians, *excluding statutes that specifically refer to* the tribe and its members") (emphasis added); 12 U.S.C. §1723a(b) (2006) ("or in *other laws specifically applicable to* Government corporations") (emphasis added); I.R.C. §833(c)(4)(B)(i) (2006) ("*State laws which are specifically and exclusively applicable to* not-for-profit health insurance or health service type organizations") (emphasis added).

law, federal law, and treaties) which happen to affect countries which have supported terrorism, regardless of whether those statutes specifically reference terrorism:

For example, statutes imposing general tariffs would be included within the proviso if the tariffs happened to apply to goods exported from nations that had supported terrorism, whether or not the statute imposing the tariff made any reference to terrorism. So too the taxes which state and local governments impose upon the commercial transactions of foreign states. The President could also abrogate portions of the U.S. Code which would punish Iraq for genocide, the use of chemical weapons, and assisting nuclear, chemical, and biological proliferation.[26]

That the government's reading of proviso two of §1503 is materially narrower than that which is justified by the plain language of the proviso was pointed out to the government by Judge Randolph in the oral argument in *Acree v. Snow*, No. 03-5195, 2003 U.S. App. LEXIS 27789 (D.C. Cir. Oct. 7, 2003):

> Randolph, J.: You're not reading the plain meaning of the statute, though. You come up here and you say this has got a plain meaning. Let me suggest to you that it doesn't. The statute by, if you read it literally, the President could wipe out federal question jurisdiction for Iraq.

Acree v. Snow Tr. at 30 (App. A at 3a). In short, the problem with a broader reading of the statute is that though it is

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[26] *See* 18 U.S.C. §1091 (2006); 22 U.S.C. §5605 (2006); 22 U.S.C. §6303 (2006); 50 U.S.C. §2410c (2000).

certainly plain it is also certainly redundant[27] and absurd,[28] a point also made by Judge Randolph.[29] In summary, under this problematic plain meaning of the proviso, President Bush would have been given the power, at the very least, to abrogate, with respect to Iraq, any provision of the U.S. Code.[30]

A. The Plain Meaning Of Proviso Two Of §1503 Is Limited To The Statutes Listed In §620A(a) Of The FAA.

The only acceptable plain meaning of "any other provision of law that applies to countries that have supported terrorism" is to confine it to the statutes contained in §620A(a):

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[27] *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) ("But of course we construe statutes, where possible, so as to avoid rendering superfluous any parts thereof.").

[28] *See Clinton v. City of New York*, 524 U.S. 417, 429 (1998) ("Acceptance of the Government's new-found reading of §692 'would produce an absurd and unjust result which Congress could not have intended.'").

[29] "[T]he plain meaning of this thing takes us off into the blue yonder, and I don't think that's where you want it to go." *Acree v. Snow* Tr. at 32 (App. A at 6a).

[30] Such as: taxes levied on foreign governments for capital gains through commercial activities, *see* Temp. Treas. Reg. §1.892-3T(a)(2) (1988) and I.R.C. §892 (2006); taxes on non-governmental sales and leases of properties, *see* Temp. Treas. Reg. §1.892-4T(c) (1988); and local laws such as real estate taxes. *See Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352, 2354–55 (2007).

Proviso two of §1503 reads, "the President may make inapplicable with respect to Iraq *section 620A of the FAA of 1961* or any other provision of law that applies to countries that have supported terrorism." Subsection (a) of §620A, in turn, lists a large number of provisions of law which provide funds to foreign nations and then states that those funds may not go to nations which have supported terrorism.

> (a) PROHIBITION.—The United States shall not provide any assistance under [the FAA[31]], the Agricultural Trade Development and Assistance Act of 1954, the Peace Corps Act, or the Export-Import Bank Act of 1945 to any country if the Secretary of State determines that the government of that country has repeatedly provided support for acts of international terrorism.

Once the list of provisions in §620A(a) is identified, it is more than obvious that the "provisions" referred to in proviso two are those in §620A(a).[32] And that is where this case ends.

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[31] The FAA comprises 400 pages of provisions granting assistance to foreign states.

[32] The structure of proviso two gave the President the ability to bypass the time-consuming procedure set forth in the rescission and waiver sections of §620A(c) and (d) of the FAA (thereby effecting immediate assistance to Iraq) and also allowed the President to choose from the multitude of foreign assistance provisions listed in §620A of the FAA those to which he wished to give effect.

The logic of this is supported by the manner in which we naturally make sense of indefinite language: that is, we interpret such language by first appealing to the immediately preceding linguistic context.[33] For example, you say to your friend, "There's the refrigerator, take anything you like." Your use of the second phrase would not give your friend the authority to take your car or your dog, or for that matter the refrigerator itself. What your friend can take is naturally restricted by the specific phrase in the first sentence ("the refrigerator").

Expanding on the above, within any language as broad and indefinite as that found in the final phrase of proviso two, there exists an implicit qualification on the

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[33] *See* Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A Matter of Interpretation 26 (1997) ("If you tell me, 'I took the boat out on the bay,' I understand 'bay' to mean one thing; if you tell me, 'I put the saddle on the bay,' I understand it to mean something else."); *see* Paul Georg Meyer, *et al.*, *Synchronic English Linguistics: An Introduction* 147 (2002) (discussing how preceding textual material gives coherence to a subsequent clause in the same sentence); Stephen Neale, Expert Report of Stephen Neale Submitted by Defendant Attorney General Alberto R. Gonzales, at 73, in *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff'd*, 534 F.3d 181 (3d Cir. 2008) (discussing how context pertains to "linguistic links and dependencies" which may be "internal to particular phrases or sentences"); Stephen Neale, *Descriptions* 101–02 (1990) (discussing how the interpretation of phrases introduced by quantifier terms (*e.g.*, "any," "some," "no," "the," and "most") "are completed using material from the clauses containing their antecedents.").

reach of the terms.[34] In this case, the relevant phrase ("any other provision of law that applies to countries that have supported terrorism") is intrinsically broad and vague,[35] and therefore requires restriction to produce a plausible meaning. This is obvious from the simple example that "any other provision of law that applies to countries that have supported terrorism" as

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[34] *See Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 849–50 (2008) (Breyer, J., dissenting) ("[W]ords such as 'all,' 'any,' 'never,' and 'none' normally rely upon context to indicate the limits of time and place within which they intend those words to do their linguistic work"; and providing a relevant example: that the phrase "there isn't any butter," uttered to his wife, is constrained by common sense and context to the refrigerator, or some other contextually relevant locale, *e.g.*, the kitchen); *Smith v. United States*, 508 U.S. 223, 241 (1993) (Scalia, J., dissenting) ("It is, however, a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'") (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993)); *see* Stephen Neale, *Descriptions* 93–102 (1990) (establishing that when quantifier terms introduce an expression, the reach of that expression is qualified by context); Stephen Neale, *On Location*, *in* M. O'Rourke & C. Washington, *Situating Semantics* 284–302 (2007).

[35] *See* discussion *supra* pp. 12–14. *See also* J. Gordon Christy, *A Prolegomena to Federal Statutory Interpretation: Identifying the Sources of Interpretative Problems*, 76 Miss. L.J. 55, 114–15 (2006) (distinguishing statutory vagueness from statutory ambiguity and noting that where a phrase's extension is uncertain the phrase is vague); Timothy Endicott, *Vagueness in Law* 133 (2001) (discussing the inter-related nature of vagueness, context dependence, and unspecificity).

it occurs here is tacitly understood by all concerned as not including, say, *Russian* law, or for that matter *Iraqi* law. So all parties accept that the reach of "any other provision of law that applies to countries that have supported terrorism" as it occurs in proviso two is restricted *at least* to *U.S.* law—despite the fact that the more specific phrase "any other provision of United States law that applies to countries that have supported terrorism" could have been used in proviso two, but was not.

Without the device of common sense qualification, by which intrinsically vague terms are comprehended, the phrase "any other provision of law ..." eludes sensible confinement, while working absurd results.[36]

Because it is incontrovertible that "any other provision" is implicitly qualified in *some* way, the question at issue concerns the precise form of the qualification. The only plausible qualification in this case is that which restricts the provision to the very definite, specific, and preceding list in §620A(a). Simply stated, the phrase "any other provision ..." is a linguistic compression of all that is found in §620A(a).

Also, the use of repetitive language is a means whereby phrases are connected.[37] Proviso two states

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[36] *See supra* pp. 13–14.

[37] *See* J.M.D. Meiklejohn, *English Language: Its Grammar, History, and Literature* 181–82 (1906); R.E. Asher & J.M.Y. Simpson, *The Encyclopedia of Language and Linguistics* 604 (1994); Paul Georg Meyer, *et al.*, *supra* note 33, at 148.

that the proviso operates with respect to §620A of the FAA and to laws applied to "countries that have supported terrorism." Section 620A itself specifically echoes this language, setting forth a list of statutes applying to countries that have "provided support for acts of international terrorism," giving internal, consistent meaning to the two phrases in proviso two. The definition of the phrase "any other provision of law" is found, *qua* list, in the very text of §620A(a), as referenced in proviso two.

In the foregoing discussion, we have described the linguistic necessity for construing proviso two as referring to the statutes listed in §620A(a). But it is not alone the language of proviso two which forces that conclusion; it also follows from the structure of the immediately surrounding text (which, it should be noted, parallels the analysis in *Ali*[38]):

To start with, the placement of the relevant language at the end of a proviso strongly suggests that a narrowing construction must be given to the words "any other provision."[39] So too that this specific proviso is embedded within a string of provisos, all of which directly relate to specific portions of the ISA.[40] Lastly, a broad and unrestrained interpretation of "any other

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[38] 128 S. Ct. at 838. *See Acree*, 370 F.3d at 52 ("In interpreting the statute at issue, '[w]e consider not only the bare meaning' of the critical word or phrase 'but also its placement and purpose in the statutory scheme.'") (quoting *Holloway v. United States*, 526 U.S. 1, 6 (1999)).

[39] *See infra* pp. 34-37.

[40] *See supra* pp. 6-8; *see also infra* pp. 35-37.

provision" would render both the reference to §620A and the ISA itself redundant because the scope of that broadened provision would include each of these statutes.

Had Congress wanted to direct the reader to statutes other than those listed in §620A(a), it would have employed a phrase such as "§620A or comparable provisions of law." Congress knows how to use such language and chose not to. It is clear from this that the scope of "any other provision ..." is limited to the provisions listed in §620A(a). It bears pointing out, as we shall see (*infra* I.B.(5)), that this is precisely the construction which Congress explained was its intent in §1083(c)(4) of the NDAA. *See Ali*, 128 S. Ct. 837 (giving support to the plain meaning analysis through reference to subsequent legislation).

In summary, "section 620A of the [FAA]" contains a list of statutes permitting international aid to countries that may be made inapplicable if "that country has repeatedly provided support for acts of international terrorism."[41] The placement of this list immediately before an inherently indefinite noun phrase, the use of nearly identical language in §1503 and §620A(a), and the logic operating within Chapter 5 of the EWSAA[42] together compel the conclusion that the correct and only plain reading of the authority to waive "any other

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[41] 22 U.S.C. §2371(a) (2006).

[42] *See infra* pp. 29–31.

provision of law" is to limit it to §620A and, specifically, to those statutes contained in subsection (a) of §620A.[43]

It is now apparent why *Ali*, 128 S. Ct. 831, is analytically distinct from the instant case. In *Ali*, the phrase that was the subject of the litigation ("[federal] law enforcement officers") is self-contained, which is to say, it comprises a known and finite set of elements. Here, however, the relevant phrase ("any other provision of law that applies to countries that have supported terrorism") refers to an intrinsically indefinite category and it is that indefiniteness which generates the implication that it is restricted by the preceding noun (§620A). *See supra* pp. 16–18. The known and finite nature of the category in *Ali* means that it does not necessarily imply a reference to a preceding restriction. In the above analogy, it would be akin to: "There's the refrigerator. Grab a beer."—as opposed to, "There's the refrigerator, take anything you like."

What further distinguishes this case from *Ali* is the presence of elements in the proximate text which collectively indicate that the proviso must be narrowly construed: that the phrase "any other provision" is embedded in a proviso,[44] that the language in subsection (a) of §620A mirrors that which follows "any other

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[43] *See, e.g., City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 450 (2002) (Scalia, J., dissenting) ("[E]vidence of pre-emptive purpose is sought in the text and structure of the statute at issue.") (quotation marks and alterations in original omitted) (citation omitted).

[44] *See infra* pp. 34-37.

provision,"[45] and that defining "any other provision" by referring back to §620A(a) gives the executive the option of deciding which sanctions, if any, to leave in place.

Other syntactical indicia tie proviso two to §620A(a). One such indicator is that no punctuation separates the antecedent from the referential phrase.[46] Unlike *Ali*, where the Court relied upon the presence of a comma between two items to indicate that the two items were entirely unconnected, 128 S. Ct. at 839, in our case the absence of such a comma indicates the opposite. That is, the absence of a comma between "section 620A of the FAA" and "or any other provision..." suggests that these two phrases are linked to each other.

The Petitioners, citing *Ali*, place emphasis on the expansive nature of the word "any." Iraq Br. at 23–24, 28. In this case, however, unlike *Ali*, "any" is of no bearing on the issue that needs to be resolved, *i.e.*, making sense of the words "other provision of law that applies to countries that have supported terrorism" in the face of that phrase's intrinsic indeterminacy. Once that meaning is resolved (as, for example, by the plain meaning set forth above), the term "any" makes sense; absent a resolution of what "other provision of law..." means, "any" is utterly unhelpful to understanding the proviso.

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[45] *See supra* pp. 18-19.

[46] *Id.* at 30; Terri LeClercq, *Expert Legal Writing* 87–89 (1995).

With the Petitioners offering no definition of the plain meaning of the statute and the government distending its definition with implications drawn from sources outside the language of the statute itself, Respondents' plain meaning is the only plain meaning. If, however, this Court finds that the statute is ambiguous,[47] Respondents demonstrate in the discussion which follows that the conventions and presumptions of statutory construction, as well as the statute's legislative history, compel the conclusion that proviso two of §1503 does not include §1605(a)(7) of the FSIA.

B. The Exclusion Of The FSIA From Proviso Two Is Compelled By The Conventions And Presumptions Of Statutory Construction And The Legislative History Of §1503.

(1) Conventions Of Statutory Construction Support The Exclusion Of The FSIA From Proviso Two.

The canon *noscitur a sociis* instructs a reader to comprehend words within their context—that is, in harmony with neighboring words in the same document.[48] The canon *ejusdem generis*, a species of *noscitur*, directs the reader of a catch-all term that

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[47] "I agree with the majority that this question of statutory interpretation is close, and I do not suggest that the EWSAA is entirely unambiguous." *Acree*, 370 F.3d at 62 (Roberts, J., concurring in part and concurring in the judgment).

[48] *See* Reed Dickerson, *The Interpretation and Application of Statutes* 233 (1975).

follows more specific terminology to confine the catch-all to items no broader than the specific term.[49]

Petitioners argue that the D.C. Circuit, in *Acree*, improperly relied on the *ejusdem* canon because it does not apply where there is no list from which to extrapolate a common feature. Iraq Br. at 25 (quoting *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 380 (2006)). This analysis is wrong because §620A provides such a list.[49]

To be exact, §620A of the FAA is an extremely expansive sanction, directing the executive to withhold assistance under four acts: (1) the Foreign Assistance Act itself, which includes 400 pages of individual provisions granting assistance and is the principal means of U.S. aid to foreign nations; (2) the Peace Corps Act; (3) the Export-Import Bank Act of 1945; and (4) the Agricultural Trade Development and Assistance Act of 1954.

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[49] *See id.* at 234 ("Thus, in the phrase 'oaks, elms, and other vegetation,' the term 'vegetation' presumably means trees."); *see also Ali*, 128 S. Ct. at 842 (Kennedy, J., dissenting) ("The *ejusdem generis* canon provides that, where a seemingly broad clause constitutes a residual phrase, it must be controlled by, and defined with reference to, the 'enumerated categories... which are recited just before it,' so that the clause encompasses only objects similar in nature.") (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)).

[50] Nonetheless, *ejusdem* is "not limited to those statutes that include a laundry list of items." *Ali*, 128 S. Ct. at 842–43 (Kennedy, J., dissenting) (citing *Norfolk & W. Ry. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991)).

Harrison v. PPG Industries, 446 U.S. 578 (1980), relied on by Petitioners, actually demonstrates, albeit by distinction, why use of the *ejusdem* canon is appropriate here. The relevant phrase in *Harrison* was "any other final action [of the EPA]," *id.* at 587, and the issue was whether this phrase included all final actions of the EPA or just those final actions of the EPA that involved administrative proceedings reflecting notice and an opportunity for a hearing. *Id.* The Court there declined to employ *ejusdem generis* because the list of statutes preceding the phrase "any other final action" was in fact not limited to those providing for notice-and-hearing proceedings and because there was "no indication whatever that Congress intended the limiting construction" of the phrase. *Id.* at 588–89 (citation omitted).

Here, in contrast, the list of statutes enumerated in §620A—referenced at the beginning of proviso two—all involve foreign assistance. Moreover, the structure of the statute, the many references to foreign assistance provisions, and the legislative history provide numerous indications that Congress intended the more limited construction of "any other provision of law."

Referring back to the discussion of *Ali*,[51] it is to be observed that in *Harrison* and *Ali* the phrases in question ("final action [of the EPA]" and "[federal] law enforcement officer," respectively) describe a finite set of known elements, and the task was to determine which of those elements was included within the statute. That is not the case here: "any other provision of law that

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[51] *See supra* p. 21.

applies to countries that have supported terrorism"—the relevant set—does not describe a conventional or even readily determinable class of elements.[52]

It is this core indeterminacy which distinguishes the phrase in this case from the phrases in *Harrison* and *Ali*,[53] and it is this core indeterminacy which leads the reader (including this Court), as a matter of common sense and as captured in the rules of linguistic coherence, to look to the preceding language in making sense of the phrase.[54] Once this is done, the key is found: a finite and identifiable, although expansive, set of statutes referenced through the citation of §620A, which give clarity to the phrase and which are consistent with the intratextual structure and logic of EWSAA §1503. Whether this Court applies the plain meaning analysis in the first section of this brief and concludes that the phrase "any other provision" is limited to the statutes in §620A(a); or the *ejusdem* analysis and determines that "any other provision" comprises statutes of like kind to those in §620A(a); or the *Acree* court's *noscitur* canon, the result is the same—proviso two does not reach the FSIA.

The *Acree* court, in its *noscitur* discussion, correctly distinguished between the FSIA and the statutes listed in the Iraq Sanctions Act on the basis that the latter

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[52] *See supra* p. 21.

[53] In *New York v. FERC*, the plain meaning of the statute was not challenged; rather, the State of New York asked the Court to set aside that meaning based on legislative history, policy, and presumptions. 535 U.S. 1, 17 (2002).

[54] *See supra* pp. 16-18.

were of a different kind, in that the primary purpose of the statutes in the ISA was to impose sanctions and embargoes on Iraq. 370 F.3d at 60. By contrast, the FSIA terrorism exception grows out of the recognized need to compensate individuals who have been victims of brutalities—such as torture, murder, and hostage taking—in violation of long-settled international norms. Compensation to victims may have the remote effect of dissuading a country from engaging in acts of inhumanity, but it is quite simply not within the same genus as an embargo or the funding of military intervention. The terrorism exception to the FSIA is no more a "sanction" than the Federal Tort Claims Act.

To be more precise with this categorical distinction, sanctions are temporary measures understood as a "specific penalty enacted in order to secure obedience. . . ."[55] Once obedience is obtained the sanctions are lifted.[56]

Sanctions have taken different forms (boycotts, blockades, and embargoes) but all share a common aspect: they are imposed on other nations with the aim of correcting immediately violations of international

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[55] *Royal Institute of International Affairs, International Sanctions: A Report by a Group of Members of the Royal Institute of International Affairs* 9 (1938) (quoting the *Oxford English Dictionary*).

[56] *See, e.g.*, Carina Staibano, *Trends in UN Sanctions: From Ad Hoc Practice To Institutional Capacity Building, in* Peter Wallensteen & Carina Staibano, *International Sanctions* 41 (2005); Mikael Briksson, *EU Sanctions: Three Cases of Targeted Sanctions, in International Sanctions* 110, 112, 146.

agreements or inimical conduct.[57] Once sanctions effect the desired change in a nation's acts, sanctions are removed. This is the essential nature of "sanctions" as that term has been used in the historical discourse of jurists, scholars, diplomats, and legislators and as understood in the international relations context.[58]

Statutes imposing civil liability (the Federal Tort Claims Act, for example) or reparations statutes, by contrast, are by their nature backward-looking compensatory measures "that seek to make up...for the harms endured" by victims, rather than altering a nation's current behavior.[59] The liability endures despite changes in government and policy.

Congress, when it amended the FSIA with the terrorism exception, made clear that countries which have supported terrorism remain responsible for their acts despite changes in behavior resulting in their removal from the State Department list.[60] Thus, the

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[57] *See* Peter Wallensteen, *A Century of Economic Sanctions: A Field Revisited*, 1 Uppsala Peace Research Papers (2000).

[58] *See* Hugo Stokke & Arne Tostensen, *Human Rights in Development* 85 (2001) ("International sanctions, in general, may be defined as the temporary abrogation of normal state-to-state relations...with a view to inducing or pressurising the targeted state into changing specified policies or modifying behaviour in certain spheres of activity in suggested directions.").

[59] Pablo De Greiff, *Repairing the Past: Compensation for Victims of Human Rights Violations, in The Handbook of Reparations* 1 (2006).

[60] *See* 28 U.S.C. §1605(a)(7)(A) (2006); NDAA §1605A(a)(2)(A)(i)(I).

terrorism exception to the FSIA is more like a statute imposing civil liability (the Federal Tort Claims Act) or a reparations statute than it is like a sanction.

To this should be added another reason why denying federal jurisdiction over pending cases is different from removing the sanctions listed in the ISA: the burden of extinguishing pending cases would fall on a small group of individuals (those U.S. soldiers and civilians who were tortured). Since the distribution of burdens for funding war is an issue long discussed in law, political philosophy, and public debate,[61] the suggestion that the second Gulf War was to be funded by sacrificing the claims of American soldiers and civilians who were tortured would surely have drawn the attention of, and caused debate within and without, Congress.

The *noscitur* canon also compels the conclusion that §1503 did not authorize the President to remove federal court jurisdiction over suits against Iraq. Section 1503 is contained in Chapter 5 of the EWSAA, which is entitled "Bilateral Economic Assistance, Funds Appropriated to the President." 117 Stat. 572. The provisions of Chapter 5 are dedicated solely to the purpose of its title—to provide U.S. appropriations

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[61] *See, e.g.*, Immanuel Kant, *Theory and Practice pt. II* (1793), *in Kant Political Writings 73, 79 n.** (2d enlarged ed., H. Reiss ed., H.B. Nisbet trans., Cambridge University Press 1991) (discussing the need to proportionately impose a war tax on all people because "an unequal distribution of burdens can never be considered just"), *available at* http://www.sussex.ac.uk/Users/sefd0/tx/tp2.htm; William Sweet, *Philosophical Theory and the Universal Declaration of Human Rights* 158-59 (2003).

through the President to Iraq and other countries, with an emphasis on allies who were aiding the United States in the war effort. *See* EWSAA, ch. 5, 117 Stat. 572–81.

Chapter 5 of the EWSAA contains six "general provisions" that apply, unless otherwise stated, to the chapter as a whole; §1503 is one of those "general provisions." *See* EWSAA §§1501–1506, 117 Stat. 578–81. These "general provisions" impose conditions upon the appropriations made throughout Chapter 5.

For example, §1502 provided that "[a]ssistance or other financing under this chapter may be provided for Iraq notwithstanding any other provision of law," 117 Stat. 578, subject to certain provisos. And §1506 directed the President to provide periodically until September 30, 2004 (also the original date of §1503's sunset) "[c]ost estimates for carrying out the proposed activities" "related to post-conflict security, humanitarian assistance, governance, and reconstruction in Iraq that are undertaken as a result of Operation Iraqi Freedom" and "[t]he source of the funds that will be used to pay such costs."[62]

The general provisions provided explicit instructions for the distribution of U.S. financial and operational assistance to Iraq and U.S. allies within the framework of the war. In order to accomplish this expeditiously, Congress passed the EWSAA quickly and provided end-runs around complicated sanctions laws that prevented the United States from funneling funds into Iraq. The purpose of Chapter 5 was clearly confined to providing

[62] 117 Stat. 580, 581

taxpayer dollars to aid the war and reconstruction. There is absolutely no indication that Congress intended, in the midst of this emergency war-funding statute, to remove federal court jurisdiction over personal injury suits.

Petitioners' and the government's interpretations of proviso two disregard the proviso's placement in the overall statutory scheme and sever the second half of the proviso from: the first half of the proviso; the enacting clause of §1503; and the text of the EWSAA as a whole. In so doing, Petitioners and the government disobey "the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (citation omitted).

(2) Presumptions Of Statutory Construction Support The Exclusion Of The FSIA From Proviso Two.

Petitioners' argument amounts to the assertion that Congress intended to remove federal court jurisdiction via §1503 by implication, since, of course, they do not contend that Congress ever specifically mentions jurisdiction or the FSIA in the EWSAA. But this Court has disapproved of implied repeals, especially when purportedly found in appropriations provisions.

> As a general rule, repeals by implication are not favored. This rule applies with especial force when the provision advanced as the repealing measure was enacted in an appropriations bill. Indeed, the rules of both

> Houses limit the ability to change substantive law through appropriations measures. *See* Senate Standing Rule XVI(4); House of Representatives Rule XXI(2).

United States v. Will, 449 U.S. 200, 221–22 (1980) (citations and quotations omitted).[63] When Congress repeals jurisdiction, it uses language leaving no doubt of that fact. *See, e.g., Bruner v. United States*, 343 U.S. 112, 113 (1952) ("The district courts shall not have jurisdiction under this section...." 65 Stat. 710, 727 (Oct. 31, 1951)). Indeed, the same Congress that passed §1503 amended 48 U.S.C. §1424-2 to withdraw "'jurisdiction to review by writ of certiorari all final decisions of the highest court of Guam from which a decision could be had'," rendering the Ninth Circuit without jurisdiction over a pending writ. *Santos v. Guam*, 436 F.3d 1051, 1052 (9th Cir. 2006) (citation omitted).

Here, no intent to repeal jurisdiction, let alone a clear one, can be reasonably deduced from the language of a statute which emits not a single word about U.S. jurisdiction and U.S. courts and does not mention the FSIA.

Petitioners argue that when foreign relations are implicated, deference to the President is the norm. Iraq Br. at 19. But deference is due a President only when he is exercising powers within the scope of his authority. There is no deference to his interpretation of the

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[63] *See TVA v. Hill*, 437 U.S. 153, 190 (1978) ("doctrine disfavoring repeals by implication...applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act.").

statutory or constitutional texts which define the boundaries of that authority.

There is no *Chevron* issue in this case. Whether *Chevron* requires the courts, when determining the boundaries of an agency's authority, to defer to an agency's views on that question, the case before this Court involves a preceding and more fundamental question: whether the courts even have jurisdiction to determine the question of deference. Logically, if there is no jurisdiction, the courts are not allowed to get to the question of whether to defer or not to defer to the Executive or administrative agencies as to the parameters of an agency's authority. This Court, no court, has ever granted the Executive or administrative agencies deference on the more elemental and far-reaching question. Even if *Chevron* were somehow implicated, since the issue in this case is the scope of the jurisdiction of the courts, the relevant "agency" (the expert body) would be the courts themselves.

Also, it is the function of the courts, "applying no more than the traditional rules of statutory construction," to determine what authority was delegated to the President. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). *See City of New York v. Permanent Mission of India to the United Nations*, 446 F.3d 365, 376 n.17 (2d Cir. 2006) ("[T]he executive branch's views on matters implicating relations with foreign states are entitled to consideration. However, 'interpretation of the FSIA's reach [is] a pure question of statutory interpretation'... and so the United States' views 'merit no special deference.'" (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004)) (citations omitted)). Congress

in enacting the FSIA and codifying the bases for jurisdiction over a foreign sovereign, and expressly removing the authority to determine the justiciability of claims from the Executive's purview, has removed any deference that might be given to the President's views as to the boundaries of FSIA jurisdiction. *See infra* note 92; *see also Alejandre v. Republic of Cuba*, 42 F. Supp. 2d 1317, 1334 (S.D. Fla. 1999) ("The President's decision to exercise his waiver is given great deference by this Court; however, his interpretation of the breadth of that waiver cannot belie the legislative authority from which it stems.")

(3) The Subordinate Nature Of Provisos Compels The Exclusion Of The FSIA From Proviso Two.

This Court has held that statutory language phrased as a proviso, although capable of introducing independent legislation, is presumptively confined in scope to that of the principal clause to which it is attached. *United States v. Morrow*, 266 U.S. 531, 535 (1925); *accord Acree*, 370 F.3d at 52–53. In this case the presumption is bolstered by the fact that the relevant language of the proviso ("any other provision ...") occurs after a specific noun (§620A), which in turn references numerous statutory provisions (as contained in the list found in subsection (a) of §620A). This Court has rarely, if ever, when confronted with such a text, abandoned the above presumption.[64]

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[64] In *Alaska v. United States*, the language to be reconciled was contained in a separate proviso, not the second half of a single proviso. 545 U.S. 75, 77 (2005). *McDonald v. United States*,

(Cont'd)

Furthermore, the proviso was located in an appropriations bill, which further supports the conclusion that the proviso relates to spending, not federal court jurisdiction.[65] This is confirmed by the memorandum from the Office of Management and Budget ("OMB"), which prepared the appropriations bill and which explained that §1503 concerned embargoes, arm sales, exports, and foreign assistance.[66] If Congress had wanted to eliminate jurisdiction, it would not have done so in the second proviso in the General Provisions section of Chapter 5 ("Bilateral Economic Assistance, Funds Appropriated To The President") of an appropriations bill without at least a single mention of U.S. courts, jurisdiction, or the FSIA.

Finally, each of the five substantive provisos of §1503 is directly related to a specific provision of the ISA. *See supra* pp. 4–8; *see also Acree*, 370 F.3d at 53. In response to this observation of the *Acree* court, the government and Petitioners both counter that proviso four—which suspends the sanction imposed by §307 of the FAA—is wholly unrelated to the ISA. *Compare Acree*, 370 F.3d at 53 *with* U.S. Br. at 14–15 and Iraq Br. at 26–27. The government and Petitioners are quite mistaken on this:

(Cont'd)

279 U.S. 12 (1929), involved the reconciliation of two separate provisos. *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424 (2002), involved the interpretation of a separate enumerated exception following a general policy. *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980), and *Ali* did not involve provisos.

[65] *See supra* pp. 30-31.

[66] Resp'ts Opp. Cert. App. 22a.

The connection between proviso four and the ISA begins with §620A of the FAA. That section bars countries which have supported terrorism from receiving assistance under all of the provisions of the FAA[67] and that, *ergo*, includes funds provided under Part I, Chapter 3, of the FAA (entitled "International Organizations and Programs"). With the enactment of the ISA in 1990, the President was specifically directed to enforce §620A against Iraq, *thereby depriving Iraq of funds available under Part I, Chapter 3*—codified as §586F(c)(2)(B).[68]

Four years later, in 1994, Congress added Iraq to §307 of the FAA. That section comprises an independent list of nations which are not entitled to funds under Part I, Chapter 3, regardless of whether or not they had supported terrorism. With the addition of Iraq to the §307 list, Iraq was thus triply barred from receiving funds under Part I, Chapter 3: first by its designation as a terrorist state which barred it from receiving any FAA funds, second by the ISA, and lastly by Iraq's inclusion on the §307 list.

The rationale behind proviso four is thus clear: to ensure that Iraq was again able to receive funds under Part I, Chapter 3 of the FAA,[69] it was not enough for

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[67] "The United States shall not provide any assistance under [this Act]...to any country if the Secretary of State determines that the government of that country has repeatedly provided support for acts of international terrorism." FAA §620A(a), 22 U.S.C. §2371 (2006).

[68] ISA §586F(c)(2)(B), 104 Stat. 2051.

[69] Approximately 79% of the funds appropriated from Part I, Chapter 3 of the FAA are dispersed to the United Nations Development Program and the United Nations Children's Fund, programs that were desperately needed in Iraq in April 2003. *See* FAA §302, 22 U.S.C. §2222 (2006).

Congress to authorize the President to suspend the ISA (or parts thereof); rather, Congress also had to add a proviso which made it indisputably clear that all three statutory bars to aid to Iraq were being lifted. Thus, while proviso four does not suspend (or authorize suspension of) any specific provision of the ISA—which was unnecessary in light of the broad authority granted to the President by the main clause of §1503 to suspend any provision of the ISA—it clearly relates to the ISA in that it ensures (by lifting the third barrier) that any decision by the President to suspend §586F(c)(2)(B) of the ISA would actually have the desired impact of allowing aid to flow to Iraq under Part I, Chapter 3 of the FAA.

(4) The Legislative History Of §1503 Also Indicates That Congress Had No Intention Of Including The FSIA In Proviso Two.

The United States invaded Iraq on March 20, 2003. Five days later, the President made a request to Congress for emergency supplemental appropriations, primarily in support of operations in Iraq.[70]

In his appeal for congressional approval of "bilateral economic assistance," the President requested the authority to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, as amended, or other provision of law that applies to countries that have supported terrorism." The President attached to his request the letter from OMB,

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[70] *See* Letter from President George W. Bush to Rep. J. Dennis Hastert, Speaker of the House of Representatives (Mar. 25, 2003), *reprinted in* H.R. Doc. No. 108-55, at 1 (2003) (Resp'ts Opp. Cert. App. 8a).

which had prepared the appropriations bill, explaining that §1503 "would repeal the Iraq Sanctions Act of 1990," and that it "would also authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act."[71]

The legislative history of the EWSAA demonstrates the objective of §1503: to reverse the sanctions imposed by the ISA, particularly those which barred Iraq from the panoply of necessary aid offered by the FAA, aid that was desperately needed by an unstable, ungoverned country torn apart by a war that was still in the invasion phase. Without §1503, the United States would have lost critical time trying to undo multiple layers of sanctions imposed on Iraq over the prior decade, making it impossible to bring some modicum of stability to the region.[72]

There is no indication anywhere in the legislative history of §1503 that Congress intended to authorize the President to make inapplicable any part of the FSIA. The House Appropriations report states as to §1503 only that it authorizes "the President to make inapplicable with respect to Iraq section 620A and section 307 of the Foreign Assistance Act with respect to Iraq." H.R. Rep. No. 108-55, at 30 (2003). Also, the "Changes in the Application of Existing Law" section required by House rules fails to

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[71] Resp'ts Opp'n Cert. App. 22a.

[72] *See, e.g.*, 22 U.S.C. §2371(c) (2006) (rescission provisions of the Foreign Assistance Act of 1961); 50 U.S.C. app. §2405(j)(4) (2000) (rescission provisions of the Export Administration Act).

mention the FSIA or any provision of the Judiciary Code, despite specifically listing §§620A and 307 of the FAA and more than four pages of other affected laws. *Id.* at 47–48. Similarly, the Senate Appropriations Report states only that "[t]he Committee provides the request for the repeal of the Iraqi Sanctions Act [sic] of 1990, *and other limitations on assistance for Iraq.*" S. Rep. No. 108-33, at 21 (2003) (emphasis added). As to the Conference Report, only the Iraq Sanctions Act and §§620A and 307 of the FAA are identified as the affected authorities: "section 1503...would make inapplicable the Iraq Sanctions Act of 1990 and authorize the President to make inapplicable with respect to Iraq section 620A and section 307 of the Foreign Assistance Act with respect to Iraq."[73]

(5) Congress Enacted Its Intent, In §1083(c)(4) Of The NDAA, To Exclude The FSIA From The Compass Of Proviso Two.

If there were any doubt that Congress never intended to remove FSIA jurisdiction in section 1503 of the EWSAA, Congress affirmatively dispelled it when it enacted §1083(c)(4) of the NDAA (entitled "Preserving The Jurisdiction of The Courts"):

> Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108–11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or

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[73] H.R. Conf. Rep. No. 108-76, at 76 (2003).

> the removal of the jurisdiction of any court of the United States.[74]

Section 1083(c)(4) thus dispenses with Petitioners' and the government's assertion that Congress removed the jurisdiction of the federal courts under the FSIA.

This Court should reject Petitioners' argument that subsequent legislative history is given little weight in interpreting prior enactments. Iraq Br. at 35. First, §1083(c)(4) is subsequent *legislation*, not subsequent legislative history. Section 1083(c)(4) was duly enacted, signed into law, and specifically concerned the very meaning of §1503. "Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380–81 & n.8 (1969).

There is a long tradition in the United States and England of legislative enactments in which a legislature mandates the manner in which a prior statute is to be interpreted. Unlike mere statements by individual legislators or more informal sorts of subsequent legislative history, such legislative enactments (referred to as "declaratory legislation") are entitled to "great weight."[75] Declaratory legislation is not simply an historic curiosity which the courts, at their discretion, are permitted to use or dismiss as evidence of legislative intent but rather are authoritative mandates from Congress. For this reason, the cases to the contrary relied on by Petitioners are inapposite.

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[74] NDAA §1083(c)(4), 122 Stat. 343.

[75] *See Loving v. United States*, 517 U.S. 748, 770 (1996).

Moreover, in this case, §1083 *controls* the interpretation because it definitively answers the question of whether §1503 reaches the FSIA.[76] Unlike *Mackey*, an example cited by the Petitioners, where Congress later legislated for opaque reasons and without accompanying explanation, here, Congress left no room for conjecture as to the answer to the dispositive question: the scope of §1503 vis-à-vis the FSIA.

Petitioners also suggest that subsequent legislation is not entitled to great weight, citing cases which concern consideration by Congresses of legislation passed many years earlier. Here, by contrast, 79% of the legislators in the 108th Congress also served in the 110th Congress, less than five years later.[77]

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[76] *See Stockdale v. The Ins. Cos.*, 87 U.S. (20 Wall.) 323, 331 (1873) ("Both in principle and authority it may be taken to be established, that a legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, and may in many cases thus furnish the rule to govern the courts in transactions which are past, provided no constitutional right of the party concerned is violated."); Yule Kim, *Statutory Interpretation: General Principles and Recent Trends*, CRS Rept. for Cong. No. 97-589, at 45 (Aug. 31, 2008) ("If the views of a later Congress are expressed in a duly enacted statute, then the views embodied in that statute must be interpreted and applied."), *available at* http://opencrs.com/.; Thomas M. Cooley, *Constitutional Limitations* 50–51 (7th ed. 1903).

[77] Senators (79/100; 79%), Representatives (346/440; 79%), Total (425/540; 79%). *Compare* Congressional Directory for the 108th Congress 307–312 *with* Congressional Directory for the 110th Congress 305–309.

Petitioners argue that even if §1083(c)(4) detracts from their interpretation of §1503, the President waived §1083(c)(4). Such a waiver would, however, have no effect on the manner in which this Court should interpret the EWSAA. To begin with, the President's rationale for his waiver of §1083 (*i.e.*, that it served the immediate interests of U.S. foreign policy in Iraq) relates to the exigencies at the time of the waiver and has no logical relationship to the accuracy of Congress' declaration with respect to its own earlier intention when it adopted the EWSAA. The force and accuracy of Congress' analysis of the history of its own intentions cannot be waived.

Lastly, the President could not have waived §1083(c)(4): the President was only authorized to waive provisions that he determined "affect[ed]" Iraq or any agency or instrumentality thereof. NDAA §1083(c)(4). Section 1083(c)(4) affects the jurisdiction of U.S. courts; if by extrapolation this could, hypothetically, affect Iraq, then that reading is too strained.[78]

C. The Authorities Of The EWSAA Lapsed On September 30, 2005.

The plain language of the EWSAA requires its authorities to sunset. Section 1503 provides that:

> [T]he authorities contained in this section shall expire on September 30, 2004, or on the

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[78] *Accord United States v. Lopez*, 514 U.S. 549, 567 (1995) ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.").

> date of enactment of a subsequent Act authorizing assistance for Iraq and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first.[79]

Congress extended the expiration date of §1503 one year to September 30, 2005.[80] Thus, absent further extensions, the authorities that §1503 granted to the President expired with the statute.

The D.C. Circuit declared this plain meaning of the sunset provision of §1503: "If the United States were correct in its interpretation of §1503, then this sunset provision would mean that, absent intervening events, §1605(a)(7) would once again be available as a basis of jurisdiction after September 30, 2004." *Acree*, 370 F.3d at 57.

Indeed, Chief Justice Roberts, then on the D.C. Circuit, read the plain language of the sunset provision as evidence of §1503's emergency and temporary nature. *See id.* at 61–62 (Roberts, J.). The authority provided to the President must have been temporary because, as then-Judge Roberts noted, "a sunset provision...is intended to buy time for fuller consideration of the issues...." *Id.* at 62. Moreover, he noted that "it hardly needs saying that the sunset provision in Section 1503 applies...to all of that section." *Id.* There was no doubt, he emphasized, that congressional inaction would cause the ISA to "return

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[79] EWSAA §1503, 117 Stat. 579.

[80] Pub. L. No. 108-106, §2204(2), 117 Stat. 1230.

to full strength on September 30, 2004." *Id.* This plain meaning, that a power granted by statute does not survive the expiration of the statute itself, is the only allowable interpretation of the sunset provision. Nor would the courts give deference to the Executive's interpretation of the termination of his authority, any more than they would defer to his definition of his authority.

The ISA continued the embargo on Iraq, which was imposed three months prior by Executive Orders 12722 and 12724. The ISA specified the penalties for violations of the embargo instituted by the President's executive orders, including denying FAA assistance to countries not in compliance.[81] The purpose of the ISA was to provide details of the penalties for violating the pre-existing sanctions and the embargo imposed by the August 1990 Executive Orders and the Secretary of State's designation of Iraq as a state sponsor of terrorism.[82]

By invoking §1503 of the EWSAA, the President suspended §620A of the FAA, as well as the ISA, thus suspending the penalties dependant upon the August 1990 Executive Orders and Iraq's designation as a state sponsor of terrorism. These suspensions were not permanent; the Executive took the steps necessary to remove permanently the sanctions underlying §620A and the ISA by issuing Executive Order 13350 and

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[81] ISA §586C, 104 Stat. 2048.

[82] *See supra* notes 1 & 9.

revoking Iraq's designation as a terrorist state.[83] Had the Executive not revoked the August 1990 Executive Orders and Iraq's terrorist state designation—the substantive sanctions without which the ISA's penalties would have been ineffectual—those penalties would have come back into force upon sunset.

The United States has advanced a strained, inconsistent, and constitutionally untenable interpretation of this plain language by suggesting that somehow the effect of the President's exercise of his temporary authorities under §1503 is perpetual and unending. *See* U.S. Br. 19 ("But the phrase 'make inapplicable' in the second proviso of EWSAA section 1503 connotes a *permanent* effect of the President's action."). But if Congress wished to "permanently make inapplicable" certain laws with respect to Iraq, Congress would have employed a commonly used term of art in the legislative arena: "repeal."

Further, the government's argument not only flies in the face of the plain language of the sunset clause, but also is inconsistent with the whole structure of §1503. That section, in essence, gave the President the power to "suspend" the ISA and other enumerated statutory provisions. "Suspend," of course, is very different from "veto" or "nullify," and the suspension logically can last only as long as the authority to suspend is in effect. Once that authority lapses (with the sunset), the suspension necessarily lapses with it.

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[83] Exec. Order No. 13350, 69 Fed. Reg. 46055 (July 30, 2004); *see* U.S. Department of the Treasury, Office of Foreign Assets Control, *What You Need to Know About U.S. Sanctions* (Nov. 30, 2004) ("On July 30, 2004, the President issued a new Executive Order 13350 effectively lifting the sanctions against Iraq....").

In addition, the government's interpretation of the sunset provision, effectively giving the President the authority and discretion to permanently make inapplicable (a.k.a. repeal) the jurisdiction of the federal courts under the FSIA, would violate the Presentment Clause (Art. I, §7, cl. 2 & 3). Though the Constitution, in Article I, section 7, contemplates the President playing a role in the legislative process, "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Clinton*, 524 U.S. at 438. Thus, even had Congress wanted to give the President the authority to permanently repeal a jurisdictional statute, the Presentment Clause would not allow it to delegate such authority. *Id.* at 446.

Further, in *Field v. Clark* and related cases, this Court identified three specific and historical prerequisites for Congress to delegate the authority even to suspend *temporarily* the operation of a statute. *Id.* at 438–42 (citing *Field v. Clark*, 143 U.S. 649 (1892)).

First, the exercise of a suspension power must be "contingent upon a condition that did not exist" at the time Congress delegated the authority. *Id.* at 443. Second, "when the President determined that the contingency had arisen," he "had a duty to suspend" the specific statute; there was no, and could be no, discretion of the President regarding whether to do so. *Id.* at 443–44. Finally, by suspending the statute, the President must be "executing the policy that Congress had embodied in the statute." *Id.* at 444. Here, the President's actions met none of these requirements.

That the instant case may have a tangential effect on foreign relations does not remove it from the constraints of *Clinton* and *Field*. Indeed, the Tariff Act of 1890 at issue in *Field* (from which this Court derived the three criteria above) directly pertained to foreign affairs in authorizing the President to impose retaliatory tariffs on specific foreign nations who unreasonably taxed U.S. exports. *Id.* at 442. *Field* itself thus makes clear that these criteria apply to any delegated congressional authority to suspend a statute regardless of whether the authority affects foreign affairs.

The United States' interpretation of the sunset provision would also render §1503 an unconstitutional delegation of legislative authority.[84] This Court differentiates between lawful and unlawful delegation: "'[t]he true distinction'...'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law'." *Field v. Clark*, 143 U.S. at 693–94 (citation omitted).

A repeal is tantamount to the power to make law.[85] In this case, if Congress conferred upon the President the discretion to repeal permanently the jurisdiction of

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[84] *See generally* Steven F. Huefner, *The Supreme Court's Avoidance of the Nondelegation Doctrine In* Clinton v. City of New York: *More than "A Dime's Worth of Difference,"* 49 Cath. U. L. Rev. 337, 341–42 (2000) (citing *The Federalist* No. 47, at 303 (James Madison)).

[85] *See INS v. Chadha*, 462 U.S. 919, 954 (1983) ("Amendment and repeal of statutes, no less than enactment, must conform with Art. I.").

the federal courts with respect to suits brought under the FSIA, this would be unconstitutional because Congress cannot delegate the core function of determining the jurisdiction of the courts.[86]

Even if it were assumed that proviso two of §1503 reached the FSIA and was not terminated under the sunset proviso (assumptions with which, as should now be relatively clear, Respondents have some objection), pending cases would still survive. The presumption applicable to the EWSAA regarding retroactivity is the foundational presumption against retroactive application absent an express statement by Congress to the contrary. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). The holding in the *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), which this Court limited to the "*sui generis*" circumstance of a statute which directly addresses the sovereign immunity of foreign nations, is of no relevance to the instant case; the

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[86] "More than one circuit court has expressed doubts as to whether Congress can constitutionally delegate such a core power as the power to control the jurisdiction of the federal courts." *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 763 (2d Cir. 1998) (citing *Miller v. FCC*, 66 F.3d 1140, 1144 (11th Cir. 1995) ("[I]t is axiomatic that Congress has not delegated, and could not delegate, the power to any agency to oust state courts and federal district courts of subject matter jurisdiction...."); *United States v. Mitchell*, 18 F.3d 1355, 1360 n.7 (7th Cir. 1994) ("[A] potential constitutional concern" was Congress "delegat[ing] such a core legislative function as its control over federal court jurisdiction to any agency or commission."). *See Owens v. Republic of Sudan*, 374 F. Supp. 2d 1, 18 (D.D.C. 2005) (stating the Executive "'can neither grant nor curtail federal court jurisdiction.'") (quoting *Carlyle Towers Condo. Ass'n v. FDIC*, 170 F.3d 301, 310 (2d Cir. 1999)).

EWSAA is an emergency appropriations act, with no chief part even tangentially related to the jurisdiction of the U.S. courts. This Court has also held that retroactivity is denied, again absent language to the contrary, when plaintiffs would have no alternative forum in which to file their claims. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 576–77 (2006). Respondents in this case have no alternative forum. Moreover, the terrorism exception to the FSIA specifically provided for damages—such as solatium—which might not be available under a plaintiff's state's law but which are available under federal law, and thus abrogation of the FSIA would impair, *inter alia*, that right.[87]

While at the time of *Acree* the court called the question "close," the majority identified a considerable foundation for its opinion, including the plain meaning ("None of these provisions remotely suggests any relation to the jurisdiction of the federal courts." 370 F.3d at 54–55); the legislative history (stating "concern" in legislative history "with eliminating statutory restrictions on aid and exports needed for the reconstruction of Iraq" was "easily understood." *Id.* at 55); the temporal scope of §1605(a)(7) compared to §1503, buttressed by the sunset proviso (*id.* at 56); and §1503's meaning in the context of the other provisions of the EWSAA and its legislative history (*id.* at 57). It is even clearer now, five years removed from the exigencies of 2004, and in light of the fact that the President never sought and Congress never gave any clarification of the scope of §1503 authority—except in §1083(c)(4)—that *Acree* was correctly decided.

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[87] *See* 28 U.S.C. §1605 note; NDAA §1605A(c).

II. By Its Clear Terms, The NDAA Has No Effect on The Courts' Jurisdiction Over Respondents' Claims.

Petitioners argue that even if the EWSAA did not deprive courts of jurisdiction over Respondents' suits, the NDAA did. But the *Simon* court and the United States government amply explain why the NDAA has no effect on Respondents' claims.

First, the language of the NDAA makes clear that the amendments inserted by §1083 (*see supra* pp. 8–10) have no application to cases pending under §1605(a)(7).

Section 1083(c), entitled "Application to Pending Cases," provides that "[t]he amendments made by this section shall apply to any claim arising under section 1605A." §1083(c)(1). Therefore, the plain meaning of §1083 dictates that these amendments are not applicable to claims under §1605(a)(7), as those claims could not have arisen under §1605A.

The amendments under §1083 offer a new basket of rights[88] to plaintiffs filing suit under the terrorism exception to foreign sovereign immunity. Congress afforded existing §1605(a)(7) claimants the opportunity to invoke §1605A's new rights by either converting their claims or filing related actions. NDAA §1083(c)(2) and (3). In order to take advantage of these rules of transition, claimants must invoke §1605A within 60 days of the latter of either (a) the date of entry of judgment

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[88] *E.g.*, new federal cause of action (§1605A(c)); barring of certain legal defenses (§1083(c)(2)(B)); a lien of *lis pendens* on an expanded class of properties (§1605A(g)); and enhanced attachment and execution provisions in §1083(b).

in the original act, or (b) the date of the enactment of the NDAA. *See id.*

But Congress did not *require* that §1605(a)(7) plaintiffs convert their claims to §1605A claims. Respondents have neither converted nor re-filed their claims under §1605A. Petitioners' position, that "Congress expressed no such intent to preserve Section 1605(a)(7) for these cases," defies logic: Congress surely did not intend to toss aside claimants who chose to forego the opportunity to convert or re-file under §1605A. Iraq Br. at 40. Nor did it intend to prevent cases from proceeding under §1605(a)(7), as evidenced by its decision to allow claimants to invoke §1605A no later than the latter of the date of judgment or the date of enactment. There would have been no need to include the date of judgment unless a §1605(a)(7) judgment could be entered after the enactment of §1083.

Finally, §1083(d)(1), entitled "Applicability to Iraq," proves that the waiver was limited, as Congress intended, to preventing claimants against Iraq from attaining the new bundle of §1605A rights. Section 1083(d)(1) limited the President's ability to waive any provision of "*this section* with respect to Iraq."[89] This point was emphasized by the Chairman of the House Judiciary Committee, John Conyers:

> It is important to note that this change does not affect rights under current law. The President's waiver authority extends only to the provisions being newly enacted in this

[89] NDAA §1083(d)(1) (emphasis added).

> bill; by its clear terms, it does not extend to current law. There is ongoing litigation... under current law; if the President exercises his new waiver authority, that litigation will proceed unaffected by that waiver.
>
> The difference is that, if the President exercises the waiver authority, [current plaintiffs] will not be helped by this new provision we wrote and passed, as we wanted them to be, and as they would be absent the waiver.[90]

From the above, it is to be concluded that the NDAA does not divest the courts of jurisdiction over the instant claims.

III. Public Policy Compels The Exclusion Of The FSIA From Proviso Two.

Petitioners argue that because the Executive prior to the enactment of the FSIA determined whether foreign nations were immune from suit, the Executive should still have that authority now. Iraq Br. at 50-52, 55-57. But the FSIA was enacted for the very purpose of bringing an end to the uneven and inherently political process by which the Executive determined and conferred immunity.[91]

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[90] 154 Cong. Rec. E46, E47 (daily ed. Jan. 17, 2008) (statement of Rep. Conyers).

[91] *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). "Not surprisingly, the governing standards were neither clear nor uniformly applied.... In 1976, Congress passed the (Cont'd)

Further, in the terrorism exception, §1605(a)(7), Congress made the measured judgment, notwithstanding past executive authority over the determination of immunity, that even if a country were to be removed from the terrorism list, it would still not have immunity for its past terrorist acts.[92] Congress made this calculated adjustment to the FSIA because of the critical importance of compensating victims and their families.[93]

Petitioners further argue that the new government of Iraq should not be responsible for the liabilities of the past government. This position is inconsistent with the fundamental principle of international law that a

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(Cont'd)

Foreign Sovereign Immunities Act in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that...decisions are made on purely legal grounds and under procedures that insure due process,' H.R. Rep. No. 94-1487, p. 7 (1976)." *Id.* (citation omitted) (alteration and ellipsis in original).

[92] *See* §1605(a)(7)(A) (immunity based on status of country at time acts occurred); *Kilburn v. Islamic Republic of Iran*, 441 F. Supp. 2d 74, 76 (D.D.C. 2006) ("Because [Libya] was a state sponsor of terrorism at the time the alleged acts occurred, the court has jurisdiction pursuant to the FSIA...."), *summarily aff'd*, No. 06-7127 (D.C. Cir. Oct. 19, 2006) (citing *Acree v. Republic of Iraq*, 370 F.3d 41, 56 (D.C. Cir. 2004) (stating country is still amenable to suit for acts that took place prior to the restoration of its sovereign immunity)).

[93] *See, e.g.*, 139 Cong. Rec. 8344 (1993) (statement of Sen. Specter) ("This legislation would let foreign sovereigns know that states which practice terrorism or actively support it will not do so without consequence" by "allow[ing] U.S. citizens...to protect their interests and seek compensation for the harm done to them.").

state's liability is not erased by changes in government.[94] It is also inconsistent with Iraq's (and the United States')[95] treaty obligations.[96]

In sum, liabilities arising from state-sponsored torture are the legal responsibility of the state, and resolution of victims' claims is a necessary and common facet of normalization, just as is resolution of outstanding commercial debt.[97]

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[94] *See* Restatement (Third) of Foreign Relations Law §207 (1987); Tai-Heng Cheng, *Renegotiating the Odious Debt Doctrine*, 70 Duke J. L. & Contemp. Probs. 7, 10–11 (2007) (government succession involves a change in government, or even a fundamental change in the structure of state authority, but it does not change the state's international legal personality; "the regime changes in Afghanistan and Iraq in the twenty-first century are examples of government and not state succession.") (citations omitted). *See also supra* p. 28.

[96] The United States has a mandatory obligation under Article 131 of the Third Geneva Convention to not "absolve" a torturing state of "any liability" for the torture of POWs. Convention (III) relative to the Treatment of Prisoners of War, Geneva, art. 131, August 12, 1949.

[96] This includes Iraq's treaty obligations under the Convention (III) relative to the Treatment of Prisoners of War, Geneva, August 12, 1949, and Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, August 12, 1949, which Iraq signed on Feb. 14, 1956, http://www.cicr.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P, and the International Convention Against the Taking of Hostages, which Iraq signed on October 14, 1980, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&id=367&chapter=18&lang=en.

[97] Iraq resolved nearly $20 billion in commercial debt by 2006, in addition to sovereign debt. Martin A. Weiss, *Iraq's Debt Relief: Procedure and Potential Implications for International Debt Relief*, CRS Rept. for Cong. No. RL33376, at CRS-9-10 (Mar. 31, 2008), *available at* http://opencrs.com/.

Secretary of State Hillary Clinton as part of her confirmation hearing also explicitly recognized that resolution by Iraq of the particular claims at issue is "a priority."[98] Secretary Clinton has also pointed out that Iraq has used these claims to get protections from the Security Council.[99]

Iraq has also demanded compensation for injured citizens, seeking, in one example, $136 million for the families of injured victims of military contractor Blackwater.[100] The United States has been instrumental in this reparations process, not only for Kuwaitis, but also for Iraqi victims of the Baathist regime.[101] By April

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[98] Answer of Secretary of State-Designate Hillary Clinton to Questions for the Record Submitted by Sen. Robert Menendez to the Senate Foreign Relations Committee (dated Jan. 13, 2009), *in* e-mail from Emily Barnes, Senate Foreign Relations Committee to Eva Tarnay, Legislative Librarian, Steptoe & Johnson LLP (Mar. 17, 2009 11:16 am EST) (App. B at 12a).

[99] *See id.* ("Iraq committed to work to settle existing claims from the Saddam era," which would include the claims at issue, "in its request to the Security Council to extend the protections for an additional year for the Development Fund for Iraq (DFI) and Iraqi oil and gas exports and revenues, including protections from legal attachments." Secretary Clinton further noted that "Foreign Minister Zebari also affirmed that the Government of Iraq was fully committed to resolving all legitimate claims and complying with its obligations under international law.").

[100] *See Iraq Demands $136M Blackwater Payout* (CBS television broadcast Oct. 8, 2007), http://cbs2.com/national/blackwater.iraq.united.2.340902.html.

[101] *See* Amb. Bremer Announces Former Regime Victims' Compensation Fund (May 26, 2004), http://govinfo.library. unt.edu/cpa-iraq/transcripts/20040526_bremer_compensation. html.

2007, it was estimated that the families of more than 500 Iraqi civilians killed by U.S. soldiers had requested compensation and, at that time, a third of those were compensated.[102]

At bottom, the handful of claims of torture and kidnapping victims simply will not upset the U.S.-Iraq alliance.

IV. The "Hybrid Veto" Is A Constitutional Nullity.

On December 19, 2007, Congress presented the President with the original NDAA (H.R. 1585), which did not contain a waiver for Iraq. On December 28, 2007, President Bush issued a "Memorandum of Disapproval" stating that "[i]n addition to withholding [his] signature and thereby invoking [his] constitutional power to 'pocket veto' bills during an adjournment of the Congress," he was also sending the bill back to the House for purposes of a contingent return veto—"to avoid unnecessary litigation about the non-enactment of the bill" that resulted from his "withholding approval."[103]

Two concerns are raised by this and the other protective returns: first, the procedure is "flagrantly, even outrageously, extraconstitutional";[104] and second,

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[102] *See* Human Rights Watch, Iraq: US Data on Civilian Casualties Raises Serious Concerns (Apr. 11, 2007), http://www.hrw.org/ (search "casualties raises concerns").

[103] J.A. 411–14.

[104] *See* Robert J. Spitzer, *The Law: The "Protective Return" Pocket Veto: Presidential Aggrandizement of Constitutional Power*, Presidential Studies Quarterly 728–29 (2001); *see Wright v. United States*, 302 U.S. 583, 596–97 (1938).

it creates uncertainty in the legislative process.[105] It is not within the President's power to invoke and rely on his "pocket veto" authority and then convert it to a second choice—a "return veto"—if the "pocket veto" proves ineffective or illegal. The Constitution provides only for the return veto and, in the instance where Congress is adjourned and return of the bill is not possible, for the "pocket veto."[106]

Since the hybrid veto was first used by President Ford, several bills have been so rejected. Congress has treated the vetoes as return vetoes, and in some cases the President has refused to promulgate the law upon override, underscoring the constitutional infirmity attendant to the contingent return veto.[107]

Central to the problem with the protective return is the president's implicit assertion that if the pocket

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[105] *See id.* ("Protective return vetoes open up a pandora's box of potential problems that simply need not exist."); Louis Fisher, *The Pocket Veto: Its Current Status*, CRS Rept. for Cong. No. RL30909, at CRS-4 (Mar. 30, 2001) ("To allow the pocket veto to expand without limit would create a kind of absolute veto that the framers had rejected.") (citing *Wright v. United States*, 302 U.S. 583, 596–97 (1938)), *available at* http://opencrs.com/.

[106] *See* Spitzer, *supra* note 104, at 728.

[107] *See* Fisher, *supra* note 105, at CRS-7. On five occasions, President Ford returned bills to Congress while at the same time claiming that he had also effected a pocket veto. *Id.* President Bush hybrid vetoed H.R. 2712, 101st Cong., 1st Sess. (1989) and H.R. 2699, 102d Cong., 1st Sess. (1991). President Clinton cast hybrid vetoes on H.R. 4810, 106th Cong., 2d Sess. (2000); H.R. 8, 109th Cong., 2d Sess. (2005); and H.R. 4392, 106th Cong., 2d Sess. (2000). Zero hybrid vetoes were cast in the Nation's first 180 years.

veto is determined to be unlawful—as in the case of the NDAA, where Congress had not gone out of session—then he will rely on the return veto. However, years of litigation can pass before it is determined that the pocket veto is not valid, and Congress, if it had respected the ostensible validity of the pocket veto, would have lost the opportunity to override the return veto.[108] In the meantime, the legal rights of those affected by the invalid pocket veto—such as the plaintiffs against Iraq who would re-file under §1605A—are compromised.[109]

In the case of the original NDAA (H.R. 1585), the President's "pocket veto" was ineffective and unlawful because Congress had not adjourned. The Senate went into *pro forma* session on December 19, 2007, convening at least every third day until the second session officially reconvened for the House on January 15, 2008. S. Con. Res. 61 (Dec. 19, 2007) (adjournment resolution adopted by both chambers). Further, both the House and Senate clerks were available to receive communications from the White House during this period.[110] As such, Congress as a whole had not adjourned and made itself unavailable to consider any veto message from the President, a necessary condition to the use of the "pocket veto."

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[108] All that matters is that it is longer than 10 days before it is determined that the pocket veto is invalid, at which point it is too late to exercise the hybrid return veto, and the bill, like the NDAA, has already become law.

[109] *See* Spitzer, *supra* note 104, at 728.

[110] Kathleen Hunter, CQ Today Online News – Defense (Jan. 2, 2008), *available at* http://public.cq.com/docs/cqt/news110-000002651175.html.

See Wright v. United States, 302 U.S. 583 (1938) (holding that the whole of Congress must adjourn for pocket veto and agents may be appointed to receive veto).[111]

Because both the original and revised NDAA became law—the former because it was improperly vetoed by the President, the latter because Congress acted upon the false assumption that the veto was valid—Respondents are not subject to a presidential waiver because the original statute granted the President no such authority. To the anticipated objection that the revised Act superseded the original Act, the response is this: a statute does not supersede a prior statute unless there is evidence of clear legislative intent to do so,[112] and here there is no such intent since Congress, when passing the revised Act, did not assume that the original Act had become law. If Congress had, in fact, known that the original Act had come into effect, Congress would have never enacted the revised §1083.

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[111] "The use of a pocket veto 'is improper whenever a return veto is possible.'" *See* Fisher, *supra*, note 105, at CRS-8 (citing Memorandum from Solicitor General Robert Bork to Attorney General Edward Levi (Jan. 26, 1976), *reprinted in* "H.R. 849," Hearing Before the Subcommittee on the Legislative Process of the House Committee on Rules, 101st Cong., 1st Sess. 127 (1989)).

[112] *See United States v. Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1985) ("[R]epeals by implication are not favored, and will not be found unless an intent to repeal is clear and manifest.") (citations and quotations omitted); *supra* section I.B.(2).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgments of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS IN *CLIFFORD ACREE, et al. v. JOHN W. SNOW, SECRETARY OF TREASURY* FILED OCTOBER 10, 2003

TRANSCRIPT OF PROCEEDINGS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-5195

CLIFFORD ACREE, *ET AL.*,

Appellees,

v.

JOHN W. SNOW, Secretary of the Treasury,

Appellants

Washington, D.C.
Date: October 3, 2003

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-5195

CLIFFORD ACREE, *ET AL.*,

Plaintiffs-Appellants,

v.

JOHN W. SNOW, Secretary of the Treasury,

Defendant-Appellee.

Friday, October 3, 2003
Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES SENTELLE, RANDOLPH, AND ROGERS

Appendix A

APPEARANCES:

ON BEHALF OF THE PLAINTIFFS-APPELLANTS:
STEWART A. BAKER, ESQ.

ON BEHALF OF THE DEFENDANT-APPELLEE:
GREGORY G. KATSAS, ESQ.

* * *

[Mr. Katsas]

* * *

of some very significant foreign policy developments growing out of the conflict and the regime change, and it is not impermissible in those circumstances for Congress to identify a closed set of statues and confer on the President a waiver power in order for him in exercising his independent foreign policy authority to respond —

JUDGE RANDOLPH: You're not reading the plain meaning of the statute, though. You come up here and you say this has got a plain meaning. Let me suggest to you that it doesn't. The statute by, if you read it literally, the President could wipe out federal question jurisdiction for Iraq.

MR. KATSAS: I think —

JUDGE RANDOLPH: Couldn't it?

MR. KATSAS: No, I don't think —

JUDGE RANDOLPH: Is that a statute that applies to, is 28 U.S.C. 13 whatever, is that a statute that applies to countries that have supported terrorism?

MR. KATSAS: I think the best —

JUDGE RANDOLPH: It is, isn't it?

MR. KATSAS: The best reading —

JUDGE RANDOLPH: No, answer my question. Does that, does federal question jurisdiction, is that a statute that applies to countries that supported terrorism?

MR. KATSAS: That statute applies to a much larger category of entities, including but not limited to countries —

JUDGE RANDOLPH: But it does apply to countries that supported terrorism, doesn't it?

MR. KATSAS: That's true, but —

JUDGE RANDOLPH: All right. Well, then —

MR. KATSAS: But it, but —

JUDGE RANDOLPH: — the President says I wipe out —

MR. KATSAS: But —

JUDGE RANDOLPH: I hereby, don't interrupt me when I'm trying to interrupt you, okay?

JUDGE SENTELLE: You have to remember which ones are in charge here. You can go ahead.

JUDGE RANDOLPH: But the President could say, ah, no more federal question jurisdiction for Iraq. Ah, no more statute of limitations.

MR. KATSAS: We don't —

JUDGE RANDOLPH: No more any other provision, let's go down the U.S. Code. We'll just wipe all these out.

MR. KATSAS: All right, what your question goes to is there are two interpretive disputes in play. The one on which the case turns is whether TRIA is a statute that applies to countries that have supported terrorism, and I think we agree, the answer to that question has to be yes. The separate, the separate, Judge Randolph, you're raising a separate interpretative question about —

JUDGE RANDOLPH: No, what I'm suggesting to you, here's what I'm suggesting to you, Mr. Katsas, is that implicit in your entire argument is an interpretation that does not depend on the plain meaning of these words. Implicit in your argument is the proposition that this is, that statutes that are triggered by the fact that the country is a terrorist state —

MR. KATSAS: Right.

JUDGE RANDOLPH: — the President can wipe out. That's not exactly what the words say, but that's implicit in your argument. I understand that.

MR. KATSAS: But —

JUDGE RANDOLPH: My only point is that the plain meaning of this thing takes us off into the blue yonder, and I don't think that's where you want to go.

MR. KATSAS: But whether or not the statute is plain with respect to the question that you raise, the narrow interpretation that you're suggesting we think is the right one. Whether you call it a question of plain meaning, whether you call it application of a canon of avoiding absurd results. Whether you, however you come to the conclusion that the statute should be limited to provisions of law that apply by virtue of a country having supported terrorism, that is plainly the best reading of this statute, and once you adopt that reading, then the further question whether TRIA is a statute encompassed within 1503 is a clear one, is one that —

JUDGE RANDOLPH: I understand. I just, I'm just, this notion that, well, it's plain.

MR. KATSAS: Statutes —

JUDGE SENTELLE: This is the only fun we have in this job is picking on counsel.

MR. KATSAS: Statutes can be unambiguous with respect to some interpretive questions but ambiguous with respect to others.

JUDGE RANDOLPH: What about the question I raised with Mr. Baker that, well, why do we even have to reach TRIA? If the two provisions which are identical, the Export Administration Act and the Foreign Assistance Act no longer apply, then Iraq can no longer be considered designated a terrorist state, because the only authority to do that is under those two provisions, and therefore we don't even get to TRIA because it's inoperative.

MR. KATSAS: I think as a technical matter, we need a little bit more than just rendering inapplicable Section 620(a), because Section 6(j) of the Export Administration Act is a separate statute that can trigger TRIA as well. But the fact that —

JUDGE RANDOLPH: It can?

MR. KATSAS: I believe it can.

JUDGE RANDOLPH: It says either —

MR. KATSAS: I believe the triggers —

JUDGE RANDOLPH: Yes. One is the 620(a), then the other is 6(j) of the Export Administration Act. Now, I was just suggesting to you that those statutes are exactly the same. They're word-for-word.

MR. KATSAS: They are exactly the same, and I think that underscores the point that in construing the operative statutory text that addresses 620(a) and any other provision of law, etc., it is —

JUDGE RANDOLPH: Was Iraq designated under the Foreign Assistance Act of 1961?

MR. KATSAS: I believe it was designated under both.

JUDGE RANDOLPH: Well, you only cited the Export.

MR. KATSAS: Right.

JUDGE RANDOLPH: Federal Register.

MR. KATSAS: Right.

JUDGE RANDOLPH: Could you provide us after argument just with the citation to save us the trouble of having to find that other provision?

Now, while I'm on this subject, and I don't want to belabor it too much, and I know you have your argument.

MR. KATSAS: I —

JUDGE RANDOLPH: I just want to ask one more question. Under both of these statutes, the Secretary of State may rescind —

MR. KATSAS: Right.

JUDGE RANDOLPH: — a designation.

MR. KATSAS: Right.

JUDGE RANDOLPH: There's a six-month wait to do that after the change of leadership.

MR. KATSAS: And there are —

JUDGE RANDOLPH: The change of leadership in Iraq occurred when, approximately? The end of April?

MR. KATSAS: Something like that.

JUDGE RANDOLPH: All right, so it's May, June, July, August, September.

MR. KATSAS: There are conditions for rescinding that we couldn't meet.

JUDGE RANDOLPH: Yes, you have to file a report, that's all. You give a report to a committee of Congress. But so the six month is October. Is the Secretary rescinding, is there anything under way to rescind the designation of Iraq as a terrorist state?

* * * *

APPENDIX B — ANSWER OF SECRETARY OF SENATE-DESIGNATE HILLARY CLINTON TO QUESTIONS FOR THE RECORD

From: Barnes, Emily (Foreign Relations)
[mailto:Emily_Barnes@foreign.senate.gov]
Sent: Tuesday, March 17, 2009 11:16 AM
To: Tarnay, Eva
Subject: FW: Clinton QFR's on Iraqi Shields
Importance: High

Questions for the Record Submitted to

Secretary of State - Designate Hillary Clinton by

Senator Robert Menendez (#24)

Senate Foreign Relations Committee

January 13, 2009

Question:

You have been a strong advocate of compensation for persons who have been the victims of acts of terrorism and torture. During the Bush administration, such justice was denied to American citizens who had been seized by the Saddam Hussein regime in the period before the Gulf war, and used as human shields.

> As Secretary of State, would you support a resolution of this situation, by calling on the Iraqis to compensate those Americans who were seized and held as human shields?

Answer:

I intend to review this matter with a view to developing an effective approach for facilitating a resolution with Iraq, which includes making the claims of U.S. victims of terrorism a priority. The Department has engaged a range of involved parties, including officials in the Iraqi government and the claimants' counsel, and will continue to engage with Iraq to encourage it to develop a resolution of these victims' claims.

Iraq committed to work to settle existing claims and debts from the Saddam era, which would include claims from victims of acts of terrorism, in its request to the Security Council to extend the protections for an additional year for the Development Fund for Iraq (DFI) and Iraqi oil and gas exports and revenues, including protections from legal attachment. The United States supported UN Security Council resolution 1859 (2008), extending the previous protections. Foreign Minister Zebari also affirmed that the Government of Iraq was fully committed to resolving all legitimate claims and complying with its obligations under international law.

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EWSAA §1503:
The President may suspend the application of any provision of the Iraq Sanctions Act of 1990:
Provided, That...

Exceptions to The Grant of Presidential Authority re ISA §586(G)(a)(1)-(4)

Proviso 1
"nothing in this section shall affect the applicability of the Iran-Iraq Arms Non-Proliferation Act of 1992..."

Proviso 3
"military equipment...shall not be exported under the authority of this section"

Clarification of Presidential Authority re ISA §586(F)(c)(2)(B)

Proviso 2
"the President may make inapplicable with respect to Iraq **section 620A of the FAA of 1961 or any other provision of law that applies to countries that have supported terrorism**"

⇩

FAA §620A(a): "The United States shall not provide any assistance under this Act, the Agricultural Trade Development and Assistance Act of 1954, the Peace Corps Act, or the Export-Import Bank Act of 1945 to any country if the Secretary of State determines that the government of that country has repeatedly **provided support for acts of international terrorism.**"

Provisions Suspended Immediately by Congress re ISA §§586(F)(c)(2) & 586(G)(a)(5)

Proviso 4
"section 307 of the FAA of 1961 shall not apply with respect to programs of international organizations for Iraq"

Proviso 5
"provisions of law that direct the United States Government to vote against or oppose loans or other uses of funds, including for financial or technical assistance, in international financial institutions for Iraq shall not be construed as applying to Iraq"

Notification, Reporting & Expiration Requirements

Proviso 6
"the President shall submit a notification 5 days prior to exercising any of the authorities described in this section to the Committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives"

Proviso 7
"...the President shall submit a report to the Committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives containing a summary of all licenses approved for export to Iraq of any item on the Commerce Control List contained in the Export Administration Regulations..."

Proviso 8
"the authorities contained in this section shall expire on September 30, 2004, or on the date of enactment of a subsequent Act authorizing assistance for Iraq and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first."

Nos. 07-1090 & 08-539

IN THE

Supreme Court of the United States

REPUBLIC OF IRAQ,

Petitioner,

v.

JORDAN BEATY, et al.,

Respondents.

REPUBLIC OF IRAQ, et al.,

Petitioners,

v.

ROBERT SIMON, et al.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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IN THE

Supreme Court of the United States

Nos. 07-1090 & 08-539

REPUBLIC OF IRAQ,

Petitioner,

v.

JORDAN BEATY, et al.,

Respondents.

REPUBLIC OF IRAQ, et al.,

Petitioners,

v.

ROBERT SIMON, et al.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

INTRODUCTION

In making former Section 1605(a)(7) inapplicable to Iraq and thus restoring Iraq's sovereign immunity to the status enjoyed by other U.S. allies, the President acted with express statutory authority and effectuated important diplomatic and foreign

policies. Tellingly, respondents do not defend the D.C. Circuit's reasoning regarding the EWSAA. The *Simon/Seyam* respondents ("Simon") invent a new interpretation of the statute that is both atextual and nonsensical. And the *Beaty* respondents ("Beaty") effectively disregard the statutory language, arguing that it should be overridden based on generic presumptions that are inapplicable here. The statute should be read as it was written, and as the President properly understood it when he acted.

Alternatively, the case can be decided on the straightforward ground that Congress removed Section 1605(a)(7) from the U.S. Code and the President waived its replacement, new Section 1605A(a), as to Iraq under express statutory authority. Respondents fail to explain how jurisdiction can be sustained based on a statute that does not exist.

Either way, these claims based on the acts of the former Iraqi regime should be addressed as the President determined they should, and as claims of this sort always have been: through State-to-State diplomatic negotiations rather than by subjecting friendly allied nations to lawsuits in each other's courts.

ARGUMENT

I. THE PRESIDENT'S EWSAA DETERMINATION MADE FORMER SECTION 1605(a)(7) INAPPLICABLE TO IRAQ.

A. The Plain Language Of EWSAA Section 1503 Includes Former Section 1605(a)(7).

Far from refuting Iraq's explanation of the flaws in the D.C. Circuit's EWSAA interpretation, Beaty does not even address it. And Simon advances an

entirely new interpretation that is patently absurd. The language is unambiguous: EWSAA § 1503 authorized the President to "make inapplicable to Iraq section 620A of the Foreign Assistance Act of 1961 or *any other* provision of law that applies to countries that have supported terrorism." That plainly includes former Section 1605(a)(7).

The major premise of Simon's new argument is false: the contention that Section 1503 is hopelessly indeterminate because it could include laws of general applicability that happen to apply to terrorism-supporting countries along with all others. Simon Br. 11-14. The argument is irrelevant to this case. Whatever the outer boundary of the statute, there is no credible argument that it does not include former Section 1605(a)(7), which applied *exclusively* to terrorism-sponsoring nations.

But even if it were necessary to resolve Simon's contrived ambiguity in this case, the statute does so. The phrase "that applies to countries that have supported terrorism" is limiting language, modifying "provision of law." Yet under Simon's view the language serves no purpose, as the statute could have stopped at "provision of law." In fact, the limitation's intended scope is obvious. The President may waive applicability as to Iraq of the relatively small set of laws specifically applicable to countries that have supported terrorism as distinguished from other countries—*i.e.*, the laws that apply because of that designation. *See* U.S. Br. 11. Many of these laws were previously cited. *See* Pet. Br. 25 n.6; U.S. Br. 2. Others are listed in the Appendix to this brief.[1]

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[1] Because this set of laws is readily discernible, the purported distinction of *Ali* v. *Fed. Bureau of Prisons*, 128 S. Ct. 831 (2008), and *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578 (1980),

EWSAA § 1503 gives one example of such a law: Section 620A of the Foreign Assistance Act ("FAA"). Section 620A is not generally applicable to all nations but rather specifically targets countries that have "repeatedly provided support for acts of international terrorism." JA344. By authorizing the President to also waive "*any other*" provision of law "that applies to countries that have supported terrorism"—the only statutory criterion of similarity—Congress allowed him to relieve Iraq from "any" of the "other" legal provisions applicable because of its prior designation as a terrorism-sponsor. This included former Section 1605(a)(7).

From their flawed premise, the Simon respondents proceed to the truly ridiculous. They jettison the D.C. Circuit's interpretation and espouse a brand-new one under which the term "any other provision of law that applies to countries that have supported terrorism" is "confine[d] * * * to the statutes contained in §620A." Simon Br. 14. This interpretation is wrong for three reasons.

First, the EWSAA says nothing like this: it refers to "any other" law without the peculiar qualification invented by respondents. If Congress had meant to include *only* the four statutes listed in FAA § 620A, it would not have said "any other." Second, the four listed statutes (which include the FAA itself) are *not* provisions of law that "appl[y] to countries that have supported terrorism" because Section 620A itself makes those laws *inapplicable* to such countries. *See* JA344. Third, if the President really was authorized to make those general assistance statutes

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on the ground that this case involves an unknown set of elements, Simon Br. 21, 25-26, is inapposite.

"inapplicable to Iraq," that action would have *prohibited* Iraq from receiving such assistance, thereby undoing what he did by making Section 620A inapplicable in the first place. Congress obviously did not intend for the President to restore Iraq's ability to receive assistance and then, in the next breath, take it away again. Indeed, the EWSAA itself authorized FAA assistance to Iraq. *See* EWSAA, Pub. L. No. 108-11, ch. 5, 117 Stat. 572.

Respondents also note that the President's authority lies in a proviso. *See* Beaty Br. 41; Simon Br. 34. But they neither explain how this nullifies the statute's plain language, nor distinguish the cases holding that provisos like this one can state independent rules. *See* Pet. Br. 26. And again without explaining why the argument matters, Simon argues that the other EWSAA provisos are all "directly related to a specific provision of the [Iraq Sanctions Act ("ISA")]." Simon Br. 35. But that is not so. The fourth proviso, for example, refers to Section 307 of the FAA, which did not apply to Iraq until 1994, well *after* the ISA was enacted. *Id.* at 36. And that provision would still have applied to Iraq even if both the ISA and FAA § 620A did not. *See* U.S. Br. 14-15. Thus, the fourth proviso was independent of the ISA and ensured that the President could relieve Iraq from disabilities that a mere suspension of the ISA would not eliminate. The second proviso, at issue here, did the same.

As applied here, Section 1503 is unambiguous: it authorized the President to make inapplicable "any" provision of law that applies to terrorism-sponsoring countries, which unquestionably includes former Section 1605(a)(7). But even if there were ambiguity, the President's interpretation would be

entitled to dispositive deference. *See* Pet. Br. 30-31; U.S. Br. 22-25. Unlike interpretation of the FSIA, where the Executive's views warrant no special deference, Simon Br. 33, the President was specifically delegated authority to implement the EWSAA in an exercise of his foreign-policy judgment. Deference is thus warranted even under respondents' own cited authority. *See Japan Whaling Ass'n* v. *Am. Cetacean Soc'y*, 478 U.S. 221, 233 (1986) (deferring to Executive's decision not to certify foreign nation as having violated treaty).

B. Applying Section 1503 To Foreign Sovereign Immunity Implicates No Anti-Retroactivity Presumption.

Unable to deny that Section 1503's plain language encompasses former Section 1605(a)(7), respondents contend that the Court should read that statute other than how it is written because of the general presumption against retroactive application of statutes. *See* Beaty Br. 7-25; Simon Br. 48-49. But that presumption is inapplicable here.

1. Like any tool of statutory construction, the presumption against retroactive application does not apply where the statute itself contains the answer. *See* Beaty Br. 9. EWSAA § 1503 provides that answer. It states that the President may "make inapplicable as to Iraq" certain provisions of law, including (as already shown) former Section 1605(a)(7). This language is unqualified. It does not say, for example, that a provision made inapplicable will nevertheless remain applicable in certain instances or cases but not others.

Thus, effective upon the President's exercise of his EWSAA authority, former Section 1605(a)(7)

became immediately and entirely "inapplicable" to Iraq, including in these cases. Respondents' cases, however, depend on the statute still being "applicable" today, as it would supply the basis for continuing subject matter jurisdiction. The language of EWSAA § 1503 admits of no such construction, and in fact provides the opposite.

The President understood this. His determination to make laws applying to sponsors of terrorism inapplicable as to Iraq was unqualified. But he *did* qualify his EWSAA suspension of the ISA, suspending all ISA provisions *except* Section 586E, which directs the penalties for past violations of export sanctions. *See* JA396, 351. As the President correctly understood, if he had not excepted Section 586E, past violators could not be penalized because the plain language of Section 1503 applies to *all* applications of the provisions of law suspended or made inapplicable as to Iraq.

2. Even if the statutory language were not dispositive, the Court held in *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), that the anti-retroactivity presumption does not apply to changes in foreign sovereign immunity. Whereas "[t]he aim of the presumption is to avoid unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct," the Court held that such conduct-shaping is not the purpose of foreign sovereign immunity. *Id.* at 696. Rather, "such immunity reflects *current* political realities and relationships, and aims to give foreign states and their instrumentalities some *present* 'protection from the inconvenience of suit as a gesture of comity.'" *Id.* (citation omitted; first emphasis added). Noting that "[t]hroughout history, courts have resolved questions

of foreign sovereign immunity by deferring to the 'decisions of the political branches * * * on whether to take jurisdiction,'" the Court held that in the "*sui generis* context" of foreign sovereign immunity, "we think it more appropriate, absent contraindications, to defer to the most recent such decision * * *." *Id.* (citation omitted).[2]

That holding applies here. *Altmann* held that the FSIA—the most recent political decision applicable to that case—applied even though the defendant nation was immune at the time of the primary conduct, because an earlier immunity determination engenders no protectable interest or settled expectation. *Id.* *See also id.* at 711 (Breyer, J., concurring) ("foreign sovereign immunity respects current status"). In this case, the most recent political decision was the President's EWSAA determination.[3] Just as the *Altmann* Court applied the FSIA to pre-enactment conduct without employing any anti-retroactivity presumption, so too does the EWSAA determination govern this case.

Beaty ignores *Altmann*'s holding. And Simon incorrectly asserts that it governs only statutes "that directly address[] the sovereign immunity of foreign nations," rather than the application of EWSAA § 1503 to former Section 1605(a)(7). Simon Br. 48. The anti-retroactivity presumption covers only the

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[2] *Cf. United States* v. *Schooner Peggy*, 5 U.S. (1 Cr.) 103, 110 (1801) (applying treaty retrospectively because anti-retroactivity presumption applies "in mere private cases between individuals" but not "in great national concerns where individual rights acquired by war are sacrificed for national purposes").

[3] In fact, there was a later decision that had the same effect: the 2008 repeal of former Section 1605(a)(7) and waiver of its replacement as to Iraq.

"*application* * * * of new statutes that would have genuinely 'retroactive' *effect*." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 277 (1994) (emphasis added). *See* Beaty Br. 11 (presumption applies only if the "*application* of the statute *to the conduct at issue* would result in a retroactive *effect*") (emphasis added). Thus, one must evaluate not the statute's general subject, but its effect as applied. Under *Altmann*, applying the EWSAA to Iraq's sovereign immunity has no genuinely retroactive effect, and the presumption therefore does not govern this case.

Indeed, the restoration of Iraq's immunity is not even arguably retroactive as applied here because the underlying events occurred between 1990 and 1995, when Iraq was absolutely immune from lawsuits like these. *See* JA166, 176, 383-87; Pet Br. 5. The EWSAA determination merely restored Iraq's status to what it was at the time of that conduct. It is therefore not retroactive because it does not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. Because Iraq was absolutely immune before 1996, respondents' actions then were not taken in reliance on their non-existent ability to sue. Given *Altmann*'s holding that foreign nations have no settled expectations about their *own* immunity status even where a change in that status results in liability that could not have been imposed when the underlying events occurred, these plaintiffs surely have no settled expectations where they could not even have sued at that time.[4]

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[4] Their attorneys filed complaints in 2003, between eight and twelve years after the underlying events. But that is not

Moreover, respondents do not dispute that they lacked any settled expectations given that claims of this sort against foreign sovereigns are always inherently subject to espousal by the Executive. *See* Pet. Br. 31-32, 42 n.11. Given that the President could have wholly eliminated their claims at any time in furtherance of foreign policies, respondents cannot complain that settled expectations were disrupted when he took the lesser step—under express statutory authorization—of making an exception to immunity inapplicable while preserving the claims for diplomatic negotiation.

Even if application of the EWSAA were not covered by *Altmann*'s "*sui generis*" rule for foreign sovereign immunity, it is also the kind of jurisdictional determination to which the anti-retroactivity presumption does not apply. *See Landgraf*, 511 U.S. at 274 (referring to statutes that "speak to the power of the court rather than to the rights or obligations of the parties"). Like the FSIA, the President's EWSAA determination "simply limits the jurisdiction of federal and state courts to entertain claims against foreign sovereigns. [It] does not create or modify any causes of action, nor does it purport to limit *foreign* countries' decisions about what claims against which defendants their courts will entertain." *Altmann*, 541 U.S. at 695 n.15

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the relevant "primary conduct," *Altmann*, 541 U.S. at 696, the anti-retroactivity presumption addresses. Indeed, these cases underscore the lack of any reasonable settled expectations regarding Iraq's status. The complaints were filed in February and March 2003, when the invasion of Iraq was imminent and shortly before the downfall of the Saddam Hussein regime. This belated rush to file thus indicates that respondents, like any reasonable observer, expected that Iraq's status might well change in the near future.

(emphasis in original). *See also id.* at 703 (Scalia, J., concurring) ("Federal sovereign-immunity law limits the jurisdiction of federal and state courts to entertain those claims, but not respondent's right to seek redress elsewhere.") (citation omitted). Thus, like other jurisdictional changes, the determination did not operate retroactively. *See Republic Nat'l Bank of Miami* v. *United States*, 506 U.S. 80, 100 (1992) ("the 'determinative event' for retroactivity purposes would be the final termination of the litigation, since statutes affecting jurisdiction speak to the power of the court") (Thomas, J., concurring).

While the lack of an available foreign forum means that these claims will be addressed diplomatically by the United States and Iraqi governments, they have not been extinguished. Thus, even under Beaty's cited authority—which is immaterial in light of *Altmann*'s specific holding and the facts of these cases—the EWSAA determination is not impermissibly retroactive. As respondents themselves note, in *Hallowell* v. *Commons*, 239 U.S. 506, 508 (1916), the Court applied a new statute that entirely eliminated a judicial forum for pending claims and instead remitted them to the "sole discretion" of the Secretary of the Interior. Beaty Br. 19.[5] This case is no different. In either event, there is no judicial forum, but the claims will be addressed by the United States government in its discretion.

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[5] By contrast, in *United States Fid. & Guar. Co.* v. *United States*, 209 U.S. 306, 315 (1908), Congress had substantively modified a cause of action upon which a commercial transaction had been rpedicated.

C. NDAA Section 1083(c)(4) Does Not Affect The President's EWSAA Determination.

NDAA § 1083(c)(4) has no effect on this case. It is possible for Congress to effectively amend a statute by declaring a construction of an existing provision.[6] But that is not what happened here. *See* Pet. Br. 35; U.S. Br. 29. The NDAA was enacted five years after the President took his actions under the EWSAA and three years after his EWSAA authorities expired. Accordingly, like the laws in the cases Iraq has cited, *see* Pet. Br. 35-36, Section 1083(c)(4) is nothing but "the opinion of individual members of the [later] legislature as to what the rule of law previously was," which "can have no binding effect." *Koshkonong* v. *Burton*, 104 U.S. (14 Otto) 668, 678 (1881).

Respondents contend that Section 1083(c)(4)'s value is determined by the degree of overlap between members of the 108th and 110th Congresses, or the amount of time (nearly five years) between the EWSAA and NDAA. *See* Beaty Br. 33-35; Simon Br. 41-42. This arithmetic is arbitrary and baseless. The salient fact is that the President acted in 2003, long before the NDAA, and the validity of his actions should therefore be judged on the statutory language before him when he acted.

But even if Section 1083(c)(4) would otherwise have affected Iraq's rights in this case, the President waived its application. Section 1083(c)(4) is not some incontrovertible "statement of fact," Beaty Br. 35, but

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[6] *Cf. Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 595-96 (1980) (applying 1972 law to later administrative action); *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 380-81 (1969) (applying 1959 amendment to 1969 regulations); *FHA* v. *Darlington, Inc.*, 358 U.S. 84, 91 (1958).

rather an ineffective, after-the-fact legal conclusion contained in a statutory provision that Congress gave the President specific authority to waive. At the President's insistence following his veto, Congress gave him the authority to determine, in his foreign policy judgment, whether application of Section 1083(c)(4) should be waived to the extent it might affect Iraq at all, and he determined that it should. Simon's assertion that Section 1083(c)(4) could not be waived because it "affects" only court jurisdiction and not Iraq itself, Simon Br. 42, is baseless. To the extent Section 1083(c)(4) could have been employed to invalidate the President's EWSAA determination and thus subject Iraq to claims for which it would otherwise be immune, it would unquestionably have "affect[ed]" Iraq and was therefore expressly subject to waiver under Section 1083(d)(1).

D. The Expiration Of The EWSAA's Authorities Did Not Nullify The President's Exercise Of Them.

Simon incorrectly argues that the President's EWSAA determination became void when the "authorities" in the EWSAA expired. Simon Br. 43-45. Simon relies on dicta from *Acree*—where no party briefed the issue—but fails to address the explanations of Iraq or the United States as to why this sunset provision has no bearing on this case.

All that expired were the "authorities" the EWSAA granted to the President to act. Nothing in the statute says that the effect of the President's *actions* would be nullified, even though Congress knows how to say so when it wants. *See* U.S. Br. 20; 19 U.S.C. § 2432(c)(3) ("A waiver with respect to any country shall terminate on the day after the waiver

authority granted by this subsection ceases to be effective with respect to such country"). And contrary to Simon's assertions, any other holding would have the drastic result of immediately re-imposing on Iraq all the onerous sanctions of the ISA, which was never repealed. *See* Pet. Br. 34; U.S. Br. 20. Although Iraq's *administrative* designation as a terrorism-sponsor was rescinded in 2004, the ISA contains its own *legislative* designation. *See* ISA § 586F(c). And the statute itself directs a panoply of sanctions, both dependent on and independent of that designation, that would all re-emerge if the President's suspension were nullified. *See* JA347-364.[7] Congress could not have intended that result.

As in the EWSAA, when Congress provides a limited period for the exercise of statutory waivers, that does not mean that the waivers themselves will automatically be nullified once the authority to issue them expires. For example, Congress time-limited the authorities to waive certain requirements for commissioning military officers and for granting U.S. citizenship to Filipino veterans. *See* Pub. L. No. 105-261, § 516, 112 Stat. 2008 (1998); Pub. L. No. 105-119, § 112(d), 111 Stat. 2460 (1997); Pub. L. No. 101-649, § 405, 104 Stat. 5039 (1990). Yet when those waiver authorities expired, officers obviously did not lose their commissions and naturalized Filipinos did not lose their citizenship. Similarly, companies whose product registration fees were waived under 7 U.S.C. § 136a-1(i)(5)(H) certainly will not have to pay

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[7] The ISA allows a Presidential waiver, *see* ISA § 586H(a), but that authority narrowly covers only the specific sanctions of ISA § 586G(a), and not the many other ISA sanctions, including those dependent on Iraq's legislative designation as a terrorism-sponsor.

them back when the waiver authority expires in 2012. And landowners who traded property with the United States did not have the transactions nullified when the exchange authorities expired. *See* 16 U.S.C. §§ 346a-5, 698(d).

The EWSAA's expiration meant that the President could not broaden his determination and it ended his reporting requirements. But it did not nullify his prior exercise of his authorities, which occurred while the authorization was in effect and which the President has never rescinded.

E. EWSAA Section 1503 Is Constitutional.

Simon (but not Beaty) contends—almost in passing—that EWSAA § 1503 is unconstitutional. *See* Simon Br. 46-48. These respondents have not come close to sustaining their heavy burden to invalidate an Act of Congress.

1. Simon contends that Section 1503 violates the Presentment Clause by purportedly delegating to the President the authority to "repeal" statutes. *Id.* at 46. That is wrong. The President's exercise of his EWSAA authority did not repeal any statute; it simply made extant statutes inapplicable to Iraq while retaining their applicability to all other nations. Indeed, the statute at issue—Section 1605(a)(7)—was not repealed until 2008, and that repeal was duly accomplished through legislation enacted by *Congress*. For this reason, respondents' invocation of the presumption against "implied repeals" of statutes, Beaty Br. 40-41; Simon Br. 31-32, also fails. The President's determination did not repeal any statute, and his authority was in any event express, not implied.

The EWSAA determination was thus no different in effect from waivers of existing legal requirements that the President and agencies are routinely authorized to issue. *See Acree* v. *Republic of Iraq*, 370 F.3d 41, 64 n.3 (D.C. Cir. 2004) (Roberts, J., concurring) ("The actions authorized by the EWSAA are a far cry from the line-item veto at issue in *Clinton* and are instead akin to the waivers that the President is routinely empowered to make in other areas, particularly in the realm of foreign affairs."). The U.S. Code is chock full of statutes that Executive branch officials are authorized to waive, on a discretionary basis, as to certain parties or in certain instances. *See, e.g., Defenders of Wildlife* v. *Chertoff*, 527 F. Supp. 2d 119, 124 & n.5 (D.D.C. 2007) (upholding constitutionality of waiver provision and noting that "there are myriad examples of waiver provisions in federal statutes") (citing statutes), *cert. denied*, 128 S. Ct. 2962 (2008).[8] They range from routine waivers of fees and penalties, *e.g.* 18 U.S.C. § 3612(h), to major policy decisions like the Federal Reserve Board's power to waive bank reserve ratios, 12 U.S.C. § 3105(a)(1)(A). And many, like EWSAA § 1503, authorize the Executive to waive application of statutes in an exercise of foreign policy discretion.[9]

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[8] An electronic search of "may waive" in the unannotated U.S. Code yields more than 900 statutes, the vast majority of which authorize Executive branch or State officials to waive application of a provision of law on a discretionary basis.

[9] *See, e.g.*, 10 U.S.C. § 2249a (waiver of prohibition against using funds to assist terrorism sponsors); *id.* § 2410i (waiver of prohibition on contracting with entities boycotting Israel); 21 U.S.C. § 1903 (waiver of sanctions against foreign narcotics traffickers); 22 U.S.C. § 2347c (waiver of requirements for foreign countries' participation in military exchanges); *id.* § 2370c-1 (waiver of prohibition on selling military equipment to

Yet under Simon's flawed reasoning, each of those waivers would be an unconstitutional "partial repeal." That is not the law. Unlike the Line Item Veto Act considered in *Clinton* v. *City of New York*, 524 U.S. 417 (1998), which gave the President "the unilateral power to change the text of duly enacted statutes," *id.* at 446-47, the text of every statute made inapplicable as to Iraq under the EWSAA continued to exist in its exact form, and retained full "legal force [and] effect," *id.* at 437, as to all other countries. And the *Clinton* Court also expressly distinguished statutes that operate in the "foreign affairs arena," where the President has "'a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.'" *Id.* at 445 (quoting *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)). The EWSAA is precisely such a statute.

In any event, like the statute upheld in *Field* v. *Clark*, 143 U.S. 649 (1892), and unlike the Line Item Veto Act, the President's EWSAA determination was not "based on the same conditions Congress evaluated" when it passed the statute; nor did the President "reject[] the policy judgment made by Congress." *Clinton*, 524 U.S. at 443, 444. The EWSAA was considered by Congress before the fall of the Hussein regime. The President's later determination following enactment thus was made under vastly different circumstances. And the determination plainly effectuated the policy of the EWSAA, which was to help rebuild and normalize relations with Iraq if conditions in Iraq warranted

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certain countries); *id.* § 2429a-2 (waiver of prohibition against assisting countries violating IAEA agreements); *id.* § 4316 (waiver of travel restrictions on foreign personnel).

those actions. But the Court need not rely on these distinctions to uphold the EWSAA, because it repealed nothing.[10]

2. Simon also suggests that the EWSAA is an unconstitutional delegation of legislative power to "determin[e] the jurisdiction of the courts." Simon Br. 48. That argument is equally far-fetched. In its entire history, the Court has invalidated only two statutes as unconstitutional delegations, *see Whitman* v. *Am. Trucking Associations*, 531 U.S. 457, 474 (2001) (citing cases), and it has *never* invalidated a delegation to the President affecting foreign affairs.

That is because the limitations on delegation applicable to domestic legislation do not apply when the Executive has "'independent authority over the subject matter.'" *Loving* v. *United States*, 517 U.S. 748, 772 (1996) (citation omitted). Thus, Congress routinely "authoriz[es] action by the President in respect of subjects affecting foreign relations which * * * leave the exercise of the power to his unrestricted judgment." *Curtiss-Wright*, 299 U.S. at 324. *See* Pet. Br. 30. Here, Congress properly authorized the President to exercise his own foreign-

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[10] *Clinton* also noted that the law in *Field* (unlike the EWSAA and countless other waiver provisions) was non-discretionary. 524 U.S. at 443. But "in distinguishing *Field*, the *Clinton* Court did not purport to adopt a three-part test based on these distinctions to determine whether a particular waiver provision is constitutional." *Defenders of Wildlife*, 527 F. Supp. 2d at 125. Indeed, other statutes discussed in *Field* dating to 1799—granted the President discretion to waive laws. *Field*, 143 U.S. at 684-91 (discussing laws allowing, but not requiring, President to discontinue foreign trade prohibitions). *Clinton* distinguished those delegations on the basis of their foreign-affairs nature. 524 U.S. at 445.

affairs power to waive a circumscribed subset of laws as to a single foreign nation, if he determined that Iraq's people and subsequent new government should be freed from onerous provisions applying to state sponsors of terrorism. Congress also required the President to report on his actions, both before and afterwards. *See* EWSAA § 1503. Far from violating separation-of-powers principles, EWSAA § 1503 embodies them, by delegating to the President the ability to act in his own foreign affairs domain.

Moreover, as applied here this delegation merely restored to the Executive a very limited portion of its pre-FSIA authority to determine the sovereign immunity of foreign nations. *See* Pet. Br. 4, 55; U.S. Br. 19. Under that authority, exercised by the Executive for more than 150 years, courts would "surrender[]" their jurisdiction—even if it had previously attached—upon the Executive's determination that a nation was immune. *Republic of Mex.* v. *Hoffman*, 324 U.S. 30, 34 (1945). Given that the Executive previously exercised this foreign-affairs power—almost since the Founding—without any express statutory authority, it cannot violate separation-of-powers for Congress to authorize, by statute, a limited restoration of a tiny sliver of that power. *Cf. Loving*, 517 U.S. at 768 ("[I]t would be contrary to precedent and tradition" to impose a "special limitation" on President's power and "contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority").

Indeed, respondents do not dispute that the President has the foreign affairs authority, even *without* statutory authorization, to *entirely* eliminate pending claims against foreign governments. *See*

Pet. Br. 31; *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1523 (D.C. Cir. 1984) (Scalia, J.). It necessarily follows that Congress does not violate separation-of-powers by delegating to the President, by statute, the lesser power to restore sovereign immunity while still preserving claims for diplomatic negotiation. That foreign sovereign immunity affects only jurisdiction and not the claims themselves only makes the validity of Section 1503 even clearer.

But even as a general matter, there is nothing unusual—much less unconstitutional—about delegating the Executive the authority to make determinations upon which federal jurisdiction or its absence may turn. For example, in *Jones* v. *United States*, 137 U.S. 202, 212 (1890), the Court applied a statute giving the Executive unreviewable authority to declare certain islands U.S. territories, which had the collateral effect of conferring federal criminal jurisdiction over them. Other such statutes exist today. *See, e.g.*, 28 U.S.C. § 1332(d)(9)(C) (jurisdiction dependent on Securities Act regulations); 28 U.S.C. § 1338(a) (jurisdiction dependent on issuance of patent by Patent Office); 28 U.S.C. § 1362 (jurisdiction over actions by Indian tribes "duly recognized by the Secretary of the Interior").

In fact, the jurisdictional provision invoked by *respondents* in these cases depends entirely on an Executive determination: the prior designation of Iraq as a state sponsor of terrorism. *See* 28 U.S.C. § 1605(a)(7)(A) (2000). If it violates separation-of-powers for Congress to delegate the President the authority to make determinations upon which federal jurisdiction may depend, then these cases cannot proceed even under respondents' own theory.

II. THE NDAA'S REPEAL OF SECTION 1605(a)(7) ELIMINATED ANY CLAIMED BASIS FOR JURISDICTION.

A. Congress Did Not Retain Section 1605(a)(7) For Pending Cases.

Alternatively, because former Section 1605(a)(7) was repealed in 2008 without reservation, it cannot supply the jurisdictional basis for these cases. Respondents merely parrot some of the D.C. Circuit's flawed reasoning on this point, without responding to the flaws identified in the opening brief.

1. As an initial matter, under *Altmann* and the plain language of 28 U.S.C. § 1330(a), the repeal of Section 1605(a)(7) applies to all cases. *See supra* at 6-11; Pet. Br. 38-40. That is so even under respondents' *own* view of the law. *See* Beaty Br. 22 (where repeal "merely changes the tribunal which can hear a case, it will be applied to pending cases"); Simon Br. 49. As respondents do not dispute, in repealing Section 1605(a)(7) Congress did not deprive any pending claimants of a judicial forum, but rather bestowed a replacement jurisdictional provision—new Section 1605A(a)—that covers *all* pending cases. *See* Pet. Br. 41. It was the *President's* waiver that eliminated Section 1605A as a potential jurisdictional basis for claims against Iraq, but that waiver indisputably applied to pre-existing and pending claims. *Id.*

2. Nothing in the NDAA provisions cited by respondents says anything about the continued applicability of Section 1605(a)(7), much less resurrects the repealed statute for these cases. And respondents ignore other NDAA provisions confirming that the repeal was not illusory. *See* Pet.

Br. 42-43. As respondents' own amici correctly note, "[p]ost NDAA the power of the court to hear a claim against a foreign state, for a terrorist act, is found under § 1605A." *Peterson* Amicus Br. 20.[11]

a. **Section 1083(c)(1).** Respondents repeat without elaboration the D.C. Circuit's erroneous view that *nothing* in NDAA § 1083—including its repeal of Section 1605(a)(7)—can ever apply to any pending case because Section 1083(c)(1) provides that the amendments apply to "any claim arising under" Section 1605A. NDAA § 1083(c)(1).[12] Beaty candidly labels this argument a mere "negative inference," Beaty Br. 15, but no such inference can properly be drawn. As Iraq has noted, Pet. Br. 45, the Section 1083 amendments must apply to pending cases, because Section 1083(c)(2)(A) specifically authorizes the filing of a motion *in pending cases*. *See* NDAA § 1083(c)(2)(A) ("pending" action "brought under section 1605(a)(7)" will be given effect under Section 1605A "on motion made by plaintiffs"). If, as respondents assert, nothing in NDAA § 1083 could

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[11] These amici purport to disagree with Iraq's position but their arguments support it. They are concerned only with enforcement of prior judgments against Iran, and merely assert that they can enforce the judgments "under a *new* warrant of jurisdictional authority created by the NDAA." *Id.* at 7 (emphasis added). The execution provisions amici rely on show that Congress knew how to make limited ongoing reference to former Section 1605(a)(7) when it wanted to. *Compare id.* at 13 *with* Pet. Br. 42-43.

[12] The United States also suggests that view. *See* U.S. Br. 30-31. But its lawyers' opinions on the interpretation of an FSIA amendment—unlike the President's stated views on a statute he was entrusted to administer—"merit no special deference." *Altmann*, 541 U.S. at 701.

ever apply to any pending case, then that conversion motion could never be filed in the first place.

Indeed, respondents belie their own theory by arguing that a provision of NDAA § 1083—Section 1083(c)(4)—applies to these pending cases. While respondents' reliance on that provision is erroneous for many reasons, *see supra* at 11-13; Pet. Br. 48, even they do not contend that Section 1083 is wholly inapplicable to pending cases.

Under respondents' theory, the repeal of Section 1605(a)(7) applies only to claims actually asserted under the new Section 1605A(c) cause of action. *Cf.* U.S. Br. 31. But that would create a bizarre hybrid jurisdictional regime. Under that regime, even *future* claims invoking the state-sponsor-of-terrorism immunity exception but alleging state, foreign, or other federal causes of action would remain governed by repealed Section 1605(a)(7), because those claims would "arise under" a cause of action other than Section 1605A(c) and the repeal of Section 1605(a)(7) would therefore not apply to them. *See* Pet. Br. 46 n.13. But that cannot be what Congress intended when it *repealed* that statute to "consolidate" all FSIA provisions relating to terrorism-sponsors in new Section 1605A. H.R. Rep. No. 110-477, at 1000.

Read correctly, Section 1083(c)(1) provides that the NDAA amendments apply to "any" claim potentially cognizable under (*i.e.*, "arising under") new Section 1605A, including claims then-pending under repealed Section 1605(a)(7). *See* Pet. Br. 45-46. Congress used the broad term "claims arising under," which encompasses inchoate claims. *Id.* A claim "arises" when the predicate facts establishing a violation occur. *See, e.g., Int'l Bhd. of Elec. Workers v. Hechler*, 481 U.S. 851, 865 n.6 (1987). Congress

did not limit the amendments' applicability to lawsuits actually "*filed* under" Section 1605A(c), even though it knew how to use that different language when it wanted. *See* NDAA § 1083(a)(1) (enacting 28 U.S.C. §§ 1605A(a)(2)(A)(i)(I), (II), which refer to claims "filed under this section"); *cf.* 28 U.S.C. § 1331 ("actions" arising under federal law).

If Congress wanted to preserve Section 1605(a)(7) for pending cases, it would have said so directly rather than through an alleged convoluted "negative inference" that does not even mention that statute. Instead, it repealed that provision without qualification and established detailed procedures under which all pending claims could be re-filed under the new law.

b. **Section 1083(c)(3).** Respondents repeat, again without elaboration, the D.C. Circuit's holding that because NDAA § 1083(c)(3) allows re-filing of pending cases under new Section 1605A after "entry of judgment in the original action," Congress must have intended (without ever saying so) to preserve Section 1605(a)(7) for those cases. But they do not address—much less refute—Iraq's explanation that this provision protects plaintiffs by allowing re-filing after judgments of dismissal for lack of jurisdiction or judgments in cases involving alternative jurisdictional bases. *See* Pet. Br. 47-48.

Thus, Section 1083(c)(3) is not "nonsensical" given the repeal of Section 1605(a)(7). Beaty Br. 16. In fact, it is quite generous to plaintiffs in state-sponsor-of-terrorism cases by allowing them multiple opportunities to preserve their claims under Section 1605A. To our knowledge, almost all of them have done so by filing amended complaints, conversion motions, new duplicative actions, or combinations of

these things. *See, e.g., Certain Underwriters at Lloyds London* v. *Great Socialist People's Libyan Arab Jamahiriya*, Nos. 06-CV-731, 08-CV-504 (D.D.C.). Plaintiffs against Iraq, of course, cannot do so because Section 1605A was waived as to Iraq. But even now, if the Court holds that Section 1605(a)(7) has been repealed and thus cannot govern pending cases, *any* plaintiffs with pending claims against other countries who still wish to re-file will be able to do so—without prejudice—within 60 days after their cases are dismissed for lack of jurisdiction. NDAA § 1083(c)(3). If plaintiffs nevertheless "cho[o]se to forego the opportunity" to re-file—perhaps because alternative jurisdictional bases suffice—they will not be "toss[ed] aside." Simon Br. 51. They will have made a conscious decision not to re-file.

c. **Section 1083(d)(1).** Simon notes that the waiver provision of Section 1083(d)(1) "was limited * * * to preventing claimants against Iraq from attaining the new bundle of §1605A rights." *Id.* That "bundle," however, includes the new immunity exception of Section 1605A(a). Thus, because Section 1605(a)(7) was repealed, the waiver of Section 1605A(a) means that there is no longer any potential jurisdictional basis for these cases.[13]

B. Congress Did Not Authorize The President To Re-Enact A Repealed Statute.

Beaty (but not Simon) also advances an alternative theory, arguing that the President's NDAA

[13] Respondents' rely on after-the-fact legislative "history" from one Congressman, Beaty Br. 28; Simon Br. 51-52, but without refuting Iraq's explanation why that statement is immaterial. Pet. Br. 44-45 n.12. Indeed, respondents misleadingly elide language showing that the statement applied to the different circumstances of *Acree*. *See id.*

waiver "waived the § 1083(b) statutory repeal [of Section 1605(a)(7)] and restored jurisdiction." Beaty Br. 25. *See also* U.S. Br. 27. The theory is wrong.

Congress nowhere authorized the President to re-enact a repealed statute through his own action. Much like the EWSAA, the NDAA simply authorized the President to "waive" application of provisions of law with ongoing effect at the time of his waiver. *See* NDAA § 1083(d)(1). The repeal of Section 1605(a)(7) happened immediately when the President signed the NDAA into law, at which point Section 1605(a)(7) ceased to exist. That was, of course, *before* he issued his waiver, since that waiver was authorized by the NDAA itself. The waiver allowed the President to relieve Iraq from the application of extant provisions of law, most notably Section 1605A(a). But it did not authorize him to rewrite the United States Code to re-enact—for one country only—a repealed law.

If there is any doubt on this point, it is conclusively answered by 1 U.S.C. § 108, which provides that "[w]henever an Act is repealed, which repealed a former Act, such former Act shall not thereby be revived, *unless it shall be expressly so provided.*" 1 U.S.C. § 108 (emphasis added). Thus, even if *Congress* had expressly *repealed* NDAA § 1083 in its entirety, that repeal would not have revived Section 1605(a)(7) unless Congress expressly so provided. *A fortiori*, the President could not accomplish the same result through a general authority to waive Section 1083, for one country, that says nothing about reviving Section 1605(a)(7).

Any other interpretation would produce absurd results. If the President could unilaterally revive Section 1605(a)(7) as to Iraq without specific direction from Congress, there would be at least two

versions of the U.S. Code—an unwritten Executive-created version for just Iraq containing Section 1605(a)(7), and a codified version for all other nations without that section. And in respondents' view, there is also a third version, which contains Section 1605(a)(7) only for pending and future claims not filed under Section 1605A(c). Moreover, because the President's waiver authority has no time limit, under Beaty's theory the President could theoretically have re-enacted Section 1605(a)(7) years or even decades later.

There is only one U.S. Code, *see* 1 U.S.C. § 204(a), and immediately upon the President's signing of the NDAA (which occurred before his waiver) Section 1605(a)(7) ceased to be part of it. The President could, and did, waive extant statutory provisions as to Iraq—notably Section 1605A(a)—but he was not authorized to, and did not, re-enact a repealed statute by his own unilateral action.

C. The "Pocket Veto" Argument Is Immaterial To This Case.

Simon muses about the President's view that the initial version of the NDAA was subject to a "pocket veto." Simon Br. 56-59. But that argument is immaterial.

First, it is *undisputed* that the NDAA containing the President's waiver authority became law on January 28, 2008, having been passed by Congress and signed by the President. Even Simon concedes that the "revised NDAA became law." *Id.* at 59. Therefore, both the repeal of Section 1605(a)(7) and waiver of Section 1605A occurred under an indisputably valid statute. The President's view that a pocket veto occurred would only have mattered if

Congress had voted to override that veto, because the only practical difference between a pocket veto and a regular "return" veto is that the former cannot be overridden. *See The Pocket Veto Case*, 279 U.S. 655, 676 (1929). But Congress chose not even to attempt an override. *See* 154 Cong. Rec. S57 (Jan. 22, 2008) (statement of Sen. Reid). Instead, it enacted a new statute that is concededly now law.

Second, the President in any event executed a return veto. "[T]o avoid unnecessary litigation," he returned the bill to the House of Representatives with a statement of objections—within the ten days provided by the Constitution—"*to leave no doubt that the bill [was] being vetoed.*" JA414. That is all the Constitution requires for a valid return veto. *See* U.S. Const. art. I, § 7, cl. 2 ("he shall return [the bill], with his objections to that House in which it shall have originated"). If the President was correct that an adjournment prevented the return's effectiveness, then a pocket veto occurred. But if not, a valid return occurred. Either way, the bill was vetoed.[14]

III. THESE CLAIMS SHOULD BE ADDRESSED DIPLOMATICALLY.

Respondents do not dispute the critical foreign policy concerns that underlie the President's actions and the restoration of Iraq's sovereign immunity. Nor do they, or their amici, identify any instance where a friendly allied nation has ever been

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[14] If it mattered here, the President correctly viewed this as a pocket veto situation because an adjournment had "prevent[ed]" the President from returning the bill to the House in which it originated within the time allowed." *The Pocket Veto Case*, 279 U.S. at 680. *See* U.S. Br. 28 n.4. But it does not matter.

subjected to jurisdiction in U.S. courts for similar claims based on the acts of a deposed regime.

Instead, Simon makes inapposite references to "international law." Simon Br. 53. Iraq does not argue that all claims have been "erased" by the regime change or that the United States has absolved any liability. *Id.* at 54. Rather, the claims will be addressed as similar claims have always been addressed in the past: through diplomatic negotiations. Simon's citation to recent comments by Secretary of State Clinton, *id.* at 55, only underscores that point. As she explained, the United States is "continu[ing] to engage with Iraq" on these issues. *Id.* at 12a. Nor is there any legal requirement for the United States to provide a judicial forum under which *other* nations can be sued for claims like these. If that were true, the FSIA itself would be invalid, because it bestows immunity on 97% of the world's nations—all those never designated as terrorism-sponsors—for such claims.

Iraq seeks only to be treated like other friendly allies—rather than as an outlaw nation—in light of its dramatically changed relationship with the United States. Both the President's EWSAA determination and the NDAA independently effectuate important foreign policy and diplomatic concerns. Either way, the Court should give effect to those valid actions rather than countermand them.

CONCLUSION

For these reasons, the judgments below should be reversed.

Respectfully submitted,

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APPENDIX

Provisions Of Law That Applied (As Of 2003) To Countries That Had Supported Terrorism

1 U.S.C. § 112b(e)(2)(B)(ii)	Requiring consultation with Secretary of State and transmittal of text of any bilateral agreement between the U.S. and a state sponsor of terrorism.
8 U.S.C. § 1735(a)	Prohibiting issuance of nonimmigrant visas to aliens from countries that are sponsors of international terrorism.
10 U.S.C. § 2249a(a)(3)	Prohibiting Department of Defense from obligating or expending financial assistance to countries that have committed an act of international terrorism or otherwise support terrorism.
10 U.S.C. § 2327(a)	Requiring disclosure in Department of Defense procurement contracts of any significant interest in firm or subsidiary owned by a foreign government that has repeatedly provided support for acts of international terrorism.

10 U.S.C. § 2327(b)(2)	Prohibiting head of an agency from entering into a contract with a firm or subsidiary in which a foreign government that has repeatedly provided support for acts of international terrorism owns or controls a significant interest.
12 U.S.C. § 635(b)(1)(B)	Permitting Export-Import Bank to deny applications for credit to state sponsors of international terrorism, or on basis of a foreign nation's lack of cooperation in efforts to eradicate terrorism.
12 U.S.C. § 635i-8(c)(2)	Conditioning reduction of debt owed to Export-Import Bank on whether country has repeatedly provided support for acts of international terrorism.

15 U.S.C. § 57b-2(b)(6)(D)	Prohibiting FTC custodian from making investigative documentation available to a foreign law enforcement agency from a country that has repeatedly provided support for acts of international terrorism.
15 U.S.C. § 7410(b)	Prohibiting grant or fellowship from Cyber Security Research and Development to any alien from a country that is a state sponsor of international terrorism.
18 U.S.C. § 175b(a)(1), (d)(2)(6)(G)	Prohibiting alien who is a national of a country that has repeatedly provided support for acts of international terrorism from shipping, transporting, or receiving biological agents or toxins.
18 U.S.C. § 2332d	Criminalizing financial transactions with any state sponsor of terrorism.

19 U.S.C. § 2462(b)(2)(F)	Making ineligible for President's designation as "beneficiary developing country" any state sponsor of terrorism.
22 U.S.C. § 262p-4q	Requiring executive directors of international financial institutions to vote against loans to any state sponsor of terrorism.
22 U.S.C. § 262p-4r	Authorizing measures to oppose funding through international financial institutions for those who commit, threaten to commit, or support terrorism.
22 U.S.C. § 286e-11	Instructing International Monetary Fund to oppose assistance to any country that permits entry to any person who has committed an act of international terrorism.
22 U.S.C. § 2227	Withholding U.S. proportionate share for certain programs of international organizations for several countries then designated as state sponsors of terror.

22 U.S.C. § 2349aa-9(a)	Permitting ban on importation into U.S. of any good or service from any country which supports terrorism or terrorist organizations or harbors terrorists or terrorist organizations.
22 U.S.C. § 2371(a)	Prohibiting U.S. assistance under the Foreign Assistance Act of 1961, Agricultural Trade Development and Assistance Act of 1954, Peace Corp Act or Export-Import Act of 1945 to any country that has repeatedly provided support for acts of international terrorism.
22 U.S.C. § 2377	Prohibiting assistance to any country that has repeatedly provided support for acts of international terrorism.
22 U.S.C. § 2378	Prohibiting assistance to those countries that provide lethal military equipment to state sponsors of terrorism.

22 U.S.C. § 2395a (note)	Making ineligible for cancellation of debt a country that has repeatedly provided support for acts of international terrorism. (Enacted by reference, Pub. L. No. 106-113, § 1000(a)(5))
22 U.S.C. § 2656f(a)	Requiring Secretary of State to submit to Congress annual detailed assessments regarding each country identified to Congress within preceding five years as a state sponsor of terrorism.
22 U.S.C. § 2712(e)(1)	Permitting Secretary of State to impose controls on provision of security services to a government that has repeatedly provided support for acts of international terrorism.
22 U.S.C. § 2778(a)(2)	Requiring consideration of whether export licenses to foreign country would support international terrorism.

22 U.S.C. § 2780(d)	Prohibiting provision of munitions item to a country that has repeatedly provided support for acts of international terrorism.
22 U.S.C. § 2798(a)(2)(B)	Requiring President to impose sanctions for proliferation of chemical or biological weapons if a foreign country's government has repeatedly provided support for acts of international terrorism.
22 U.S.C. § 4305	Prohibiting acquisition of real property in the U.S. by a foreign mission of a country that has repeatedly provided support for acts of international terrorism.
22 U.S.C. § 7205(a)(1)	Limiting to one-year licenses the export of agricultural commod-ities, medicine or medical devices to country that has repeatedly provided support for acts of international terrorism.

22 U.S.C. §§ 7532, 7533(b)	Making state sponsors of terrorism ineligible for U.S. assistance with drawdown of defense articles, defense services, and military education and training.
26 U.S.C. § 901(j)(2)(A)(iv)	Denying tax credits for any income, war profits, or excess profits taxes paid or accrued to a country that has repeatedly provided support for acts of international terrorism.
28 U.S.C. § 1605(a)(7) (repealed)	Abrogating immunity of state sponsors of terrorism from jurisdiction of U.S. courts in certain suits for money damages.
28 U.S.C. § 1610(f)(1)(A) & note	Exposing property in U.S. of a state sponsor of terrorism to attachment in aid of or from execution upon certain judgments; "blocked assets" of such nations subject to execution or attachment under § 201(d)(2) of Terrorism Risk Insurance Act.

50 U.S.C. §§ 1701 note & 1702(b)(3)	Permitting President to regulate imports of films, compact disks, news feeds and other media from state sponsors of terrorism.
50 U.S.C. § 2202	Prohibiting transfer of spoils of war in the possession, custody, or control of the U.S. to any country that has repeatedly provided support for acts of international terrorism.
50 App. U.S.C. § 2170(f)(4)(A)(i)	Authorizing President to suspend or prohibit certain mergers, acquisitions or takeovers, and consider the potential effects of the proposed transaction on sales of military goods, equipment or technology to any country that supports terrorism.

50 App. U.S.C. § 2402(8)	Declaring U.S. policy to use export controls to encourage other countries to prevent the use of their territories or resources to aid, encourage, or give sanctuary to persons involved in directing, supporting, or participating in acts of international terrorism.
50 App. U.S.C. § 2405(j)(1)(A)	Authorizing the Secretary of State to make a determination controlling export of goods and technology as to whether government of a country has repeatedly provided support for acts of international terrorism.
50 App. U.S.C. § 2410c(a)(2)(B)	Requiring President to impose procurement and import sanctions for contribution to proliferation of chemical and biological weapons on any country that has repeatedly provided support for acts of international terrorism.

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Supreme Court, U.S.
FILED
DEC 19 2008
OFFICE OF THE CLERK

No. 08-539

IN THE
Supreme Court of the United States

REPUBLIC OF IRAQ, *et al.*,

Petitioners,

v.

ROBERT SIMON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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RESPONSE TO THE BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN *BEATY v. REPUBLIC OF IRAQ*

Pursuant to Sup. Ct. R. 15.8, Respondents submit the following response to the Brief for the United States as *Amicus Curiae* ("U.S. Br.") filed December 12, 2008, in the case of *Republic of Iraq v. Beaty*, No. 07-1090. Because the United States urges the Court to grant *certiorari* to consider Iraq's argument that the President has divested the courts of jurisdiction over cases against Iraq, squarely implicating the outcome of the petition for *certiorari* filed in this case, Respondents offer the following points in reply.[1] As the United States concedes, there is no split in authority at issue.[2] (U.S. Br. at n.1.)

ARGUMENT

I. THIS COURT IS BOUND BY CONGRESS' ENACTED STATEMENT OF INTENT AS TO § 1503 OF THE EWSAA.

Section 1083(c)(4) of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 338 (2008) ("NDAA"), declaring

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[1] A decision in *Beaty* or *Simon* would necessarily involve consideration of *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004). Chief Justice Roberts has stated he "would also recuse [himself] from matters in which [he] participated while a judge on the court of appeals." Statement of Judge John G. Roberts, Jr. to the United States Senate Committee on the Judiciary at 62 (Aug. 1, 2005).

[2] For this reason the entirety of Iraq's argument regarding the NDAA (Br. for Pet'rs at 26-28; Reply Br. at 7-11) must be discounted.

Congress' intent with respect to § 1503 of the previously enacted Emergency Wartime Supplemental Appropriations Act of 2003, Pub. L. No. 108-11, 117 Stat. 559 (2003) ("EWSAA"), precludes the courts from holding that they are without jurisdiction over cases pending under § 1605(a)(7) of the Foreign Sovereign Immunities Act ("FSIA"). The Solicitor General's response to this is to repeat the saw from *South Dakota v. Yankton Sioux Tribe* that the actions of a subsequent Congress are given little weight in interpreting prior enactments. (U.S. Br. at 18–19.) From this it is to be assumed that the Solicitor General is not entirely familiar with the law in this area, a review of which will now be provided:

There is a long tradition in the United States and England of legislative enactments in which a legislature mandates the manner in which a prior statute is to be interpreted.[3] Such enactments (referred to as "declaratory legislation") are binding on the courts, and as such, occupy the latter end of a continuum of subsequent congressional actions which at one pole are given little or no weight (*e.g.*, statements by individual legislators occurring long after the relevant enactment) and at the other side

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[3] *See* Thomas M. Cooley, *Constitutional Limitations* at 50–51 (7th ed. 1903); *Stockdale v. The Ins. Cos.*, 87 U.S. (20 Wall.) 323 (1873) ("Both in principle and authority it may be taken to be established, that a legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, and may in many cases thus furnish the rule to govern the courts in transactions which are past, provided no constitutional right of the party concerned is violated.").

are binding on the courts.[4] Declaratory legislation is not simply an historic event which the courts, at their discretion, are permitted to use or dismiss as evidence of legislative intent but rather are authoritative mandates from the Congress, which the courts must follow.[5]

The Solicitor General's citation to *South Dakota v. Yankton Sioux Tribe* and other cases is misplaced because none of the cases involved an act of Congress which dictated a specific interpretation of an earlier statute. In *Yankton Sioux*, the issue was whether a nineteenth-century act of Congress had ceded certain tribal lands to the U.S. government. 522 U.S. 329, 354 (1998). In support of the contention that the lands were still part of the reservation, the Tribe and United States cited to statements made during congressional hearings held a century after enactment. The Supreme Court discounted those statements because they were contradicted by other

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[4] Yule Kim, *Statutory Interpretation: General Principles and Recent Trends*, Congressional Research Service Report for Congress No. 97-589 at 45 (Aug. 31, 2008) ("If the views of a later Congress are expressed in a duly enacted statute, then the views embodied in that statute must be interpreted and applied."). *See, e.g., Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380–81 (1969) ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.").

[5] Reed Dickerson, *The Interpretation and Application of Statutes* at 180 (3d ed. 1975) ("Whether or not [declaratory legislation] would be reliable as a declaration of previous intent, it is effective, not as an interpretation (which might be an unconstitutional invasion of the powers of a coordinate branch of government), but as a new act of legislation. Thus, even if it were wholly inadequate as an interpretation, it could stand as an amendment of the earlier statute.").

post-enactment statements and because they occurred so long after the original legislation. 522 U.S. at 354–55. The other cases cited by the Solicitor General are similarly irrelevant.[6]

Finally, the Petitioners and Solicitor General argue that even if they are wrong as to the effect of § 1083(c)(4), the President waived that section, along with the rest of § 1083. Such a waiver would, however, have no effect on the manner in which this Court should interpret the EWSAA. The reason for this is that the President's rationale for his waiver of § 1083 (*i.e.*, that it served the immediate interests of U.S. foreign policy in Iraq) has no bearing on the accuracy of Congress' declaration with respect to its earlier intention when it adopted the EWSAA. For that reason, Congress' declaration of its intent, even if waived for other reasons, remains controlling as to the question of the legislative intent behind the EWSAA.

Further to that point, the President could not have waived § 1083(c)(4). The President was authorized, after making certain findings, to waive provisions that he determined affect Iraq or any agency or instrumentality thereof. 122 Stat. at 343. However, § 1083(c)(4) is an enacted statement of intent as to an earlier statute, and not itself a provision which affects Iraq. In addition, the object of § 1083(c)(4) — § 1503 of the EWSAA — also cannot be considered a provision that affects Iraq because

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[6] *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633 (1990) (failed legislative proposals poor indicators of intent in 1974 ERISA); *United States v. Sw. Cable Co.*, 392 U.S. 157 (1968) (failed legislative proposals poor indicators of intent in 1934 Communications Act).

that law has been inoperative since its sunset September 30, 2004. *See* 117 Stat. 579.

Finally and most importantly, the reader of this brief should note that the law of legislative declarations and their application to the facts of *Simon* and *Beaty* have received no consideration from the courts below — and yet it will consume the near entirety of this Court's attention should the Court grant the instant petition. This makes these cases particularly inappropriate for review by this Court.

II. THE UNITED STATES' CONSTRUCTION OF § 1503 IS NOT SUPPORTED BY THE TEXT OF THE EWSAA.

The United States' proposed interpretation of "any" to include any and every law, without limitation, is simply too facile. (U.S. Br. at 8–13). First, giving "any . . . provision of law that applies to countries that have supported terrorism" the unbounded interpretation the United States and Iraq have suggested would cause "any" to swallow the whole, thereby, for example, eliminating the EWSAA and the President's authority to waive the statute. This Court has not hesitated to limit the term "any" when there was reason to do so.[7]

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[7] *See, e.g., Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 837 n.4 (2008) (citing cases in which Court for various reasons applied narrowing construction to "counteract the effect of expansive modifiers"); *id.* at 850 (Breyer, J., dissenting) ("[I]t is context, not a dictionary, that sets the boundaries of time, place, and circumstance within which words such as 'any' will apply." (citing *United States v. Palmer*, 16 U.S. 610, 3 Wheat. 610, 631, 4 L. Ed. 471 (1818) (Marshall, C. J.) ("[G]eneral words," such as

The surrounding context also compels a controlled reading of "any." Section 1503 is found in a proviso, which is most naturally read as limiting and relating to the predicate subject matter,[8] and the proviso is in an appropriations bill, which gives both context to the meaning of the provision as being related to spending and removing obstacles to spending, as well as giving pause in finding that Congress removed jurisdiction in such a legislative vehicle. The author of § 1503 (OMB) stated that § 1503 concerned embargoes, arm sales, exports, and foreign assistance,[9] and if Congress had wanted to eliminate an entire jurisdictional basis implicating 28 U.S.C. sections 1602–1611, it would not have been buried in the mouse hole that is the second proviso in the General Provisions section of Chapter 5

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the word "'any'," must "be limited" in their application "to those objects to which the legislature intended to apply them"); *Small v. United States*, 544 U.S. 385, 388 (2005) ("The word 'any' considered alone cannot answer" the question "whether the statutory reference 'convicted in any court' includes a conviction entered in a foreign court"); *Nixon v. Missouri Municipal League*, 541 U.S. 125, 132 (2004) ("'[A]ny'" means "different things depending upon the setting"); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994) ("[R]espondent errs in placing dispositive weight on the broad statutory reference to 'any' law enforcement officer or agency without considering the rest of the statute")).

[8] It is "customary to use a proviso to refer only to things covered by the preceding clause . . . ." *Alaska v. United States*, 545 U.S. 75, 106 (2005). "The general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality and prevent misinterpretation." *United States v. Morrow*, 266 U.S. 531, 534 (1925). "Its grammatical and logical scope is confined to the subject matter of the principal clause." *Id.* at 534–35.

[9] *See* App. C to Resp'ts' Br. in Opp'n at 22a.

(BILATERAL ECONOMIC ASSISTANCE FUNDS APPROPRIATED TO THE PRESIDENT) of an appropriations bill.

The other arguments the United States offers are also unavailing. The U.S. tries to re-cast § 1605(a)(7) as a "sanction" to make it better fit its argument. (U.S. Br. at 2, 10.) Section 1605(a)(7) is better understood as a means of compensatory redress for personal injury torts, claims which could only be brought against foreign states under the auspices of the FSIA. The principal sponsors of the section both expressed the view that the purpose of the amendment was to give American victims a means of redress for personal injuries and did not describe it as a sanction.[10] This is consistent with the fact that punitive damages against the state sponsors of terrorism themselves were expressly prohibited. *See* 28 U.S.C. § 1606 (2000).

The U.S. also contends that the import of the sunset provision in § 1503 was misunderstood. It argues that the laws removed by the President prior to the sunset are permanently revoked and that only the authority to act expired. (U.S. Br. at 13.) Under § 1503, however, the President's authority to declare § 1605(a)(7) inapplicable with respect to Iraq lapsed after one year, absent further congressional authority. None was given. The majority in *Acree* noted that the sunset provision was inconsistent with

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[10] *See* 139 Cong. Rec. S4925 (1993) (statement of Senator Specter) ("This legislation would . . . allow U.S. citizens . . . to protect their interests and seek compensation for the harm done to them."); 142 Cong. Rec. H2141-42 (1996) (statement of Congressman Fox) ("I introduced . . . the State-Sponsored Terrorism Responsibility Act to allow American victims to have a means of redress in the courts.").

the government's position that § 1503 of the EWSAA extended to § 1605(a)(7) of the FSIA. *Acree v. Republic of Iraq*, 370 F.3d 41, 56-57 (D.C. Cir. 2004). Consistent with the majority, Judge Roberts observed that it could not be assumed that the Congress would decline to exercise its prerogative to extend the sunset. *Id.* at 61–62. But Congress did not. Judge Roberts' statement reveals his belief that the effect of the waiver was coterminous with the congressional authorization.

Finally, Iraq since 2004 has been actively litigating in federal court.[11] Had the U.S. believed that jurisdiction did not exist because of § 1503, it would have informed Congress or filed a Statement of Interest telling the courts that they lacked jurisdiction. But it did not. Similarly, Congress would not permit the courts to adjudicate cases in jurisdictional limbo, especially with regard to Iraq, if it felt that *Acree* were wrongly decided. In fact, Congress did the opposite and enacted § 1083(c)(4), stating that § 1503 did not affect jurisdiction.

III. THE U.S. MISINTERPRETS THE RELEVANCE OF THE LIBYAN CLAIMS RESOLUTION ACT.

Libya, like Iraq, now friendly and once hostile, was a defendant in the several cases brought by the Pan Am 103 families. *See, e.g.*, *Rein v. Socialist*

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[11] *Simon v. Republic of Iraq*, Civil No. 1:03-cv-00691 (D.D.C.); *Seyam v. Republic of Iraq*, Civil No. 1:03-cv-00888 (D.D.C.); *Vine v. Republic of Iraq*, Civil No. 1:01-cv-02674 (D.D.C.); *In re Terrorist Attacks on September 11, 2001*, 03-MD-1570 (S.D.N.Y.); *Beaty v. Republic of Iraq*, Civil No. 03-0215 (D.D.C.); *O'Neill v. Republic of Iraq*, 04-GBD-01076 (S.D.N.Y.).

People's Libyan Arab Jamahiriya, 995 F. Supp. 325 (E.D.N.Y.), *aff'd in part and dismissed in part*, 162 F.3d 748 (2d Cir. 1998). Facing liability in U.S. courts, Libya settled through an agreement struck by the United States and Britain. U.S. Department of State Fact Sheet, *Significant Events in U.S.-Libyan Relations* at http://www.state.gov/r/pa/prs/ps/2008/sept/109054.htm (last visited Dec. 18, 2008). Libya accepted responsibility for the actions of its officials in the Pan Am 103 bombing and established an escrow account paying over $1 billion in 2003 and again in 2004 to settle. *Id.* Yet, following normalization, Libya was still faced with liability for terrorist acts and so it agreed to the Libyan Claims Resolution Act to settle all outstanding claims. *See* Pub. L. No. 110-301, 122 Stat. 2999 (2008) (codified at 28 U.S.C. § 1605A note).

The United States cites the Libyan Claims Resolution Act as support for its argument that it is "unremarkable" that § 1503 would allegedly be given immediate effect. (U.S. Br. at 14.) This badly misses the point. The Act was no different from a settlement agreement in any other litigation — once it had been certified that Libya had paid the agreed monies into escrow, it would then be released from future liability.[12] This is typical of a settlement and does not explain why Iraq would be given immediate immunity *without* satisfying outstanding claims in return. In short, Iraq gains no support from Libya, which was removed from the terrorism list by owning

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[12] *See* Libyan Claims Resolution Act §§ 3, 5(a)(1), 122 Stat. 2999-3000; U.S. Department of State Fact Sheet at http://www.state.gov/r/pa/prs/ps/2008/sept/109054.htm.

up to its liability for the past harms perpetrated by its government and settling those claims. Iraq wants the freedom from liability without satisfying the handful of debts it owes for torturing and kidnapping Americans. This is contrary to, not consistent with, the Libyan situation.

That successor governments remain liable for past governments' legal liabilities (be they commercial or, as in this case, personal injury claims) is an unassailable principle of international law. This principle held true with Libya, and is equally applicable to the United States and Iraq.

IV. THE PRESIDENT IS NOT ENTITLED TO DEFERENCE IN THIS CIRCUMSTANCE.

While the President is entitled to exercise inherent power over the conduct of foreign affairs free from judicial interference, that is not what the President has done here. Rather, the President has exercised a power that was specifically delegated to him by Congress within the scope of its own authority, and the President may not, in exercising that authority, exceed the powers that Congress has delegated to him.

Nor is the President entitled to deference in deciding the limits of that authority. Instead, it is the function of the courts, "applying no more than the traditional rules of statutory construction," to determine what authority was delegated to the President. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). This rule has been expressly applied by this and other courts to interpretation of the FSIA. *See City of New York v. Permanent Mission of India to the United Nations*,

446 F.3d 365, 377 n.17 (2d Cir. 2006) ("the executive branch's views on matters implicating foreign relations are entitled to consideration. However, 'interpretation of the FSIA's reach [is] a pure question of statutory interpretation' . . . and so the United States' views 'merit no special deference.'" (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004)) (citations omitted).

CONCLUSION

For the foregoing reasons, this Court should deny the petitions for *certiorari* in *Simon* and *Beaty*.

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(12) (18)

Nos. 07-1090 and 08-539

FILED
APR 1 3 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

REPUBLIC OF IRAQ,

Petitioner,

v.

JORDAN BEATY, ET AL.,

Respondents.

REPUBLIC OF IRAQ, ET AL.,

Petitioners,

v.

ROBERT SIMON, ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENTAL BRIEF OF RESPONDENTS

Respondents submit this supplemental brief regarding the temporal scope of Section 1503 of the Emergency Wartime Supplemental Appropriations Act, Pub. L. No. 108-11, 117 Stat. 559, 579 (2003) (Section 1503). Although the D.C. Circuit previously made clear that the President's authority under Section 1503 sunset with the statute (*see Acree v. Republic of Iraq*, 370 F.3d 41, 57 (D.C. Cir. 2004); *id.* at 62 (Roberts, J., concurring in part and dissenting in part)), and respondents vigorously contested Iraq's expansive reading of Section 1503's temporal scope at the certiorari stage (Simon Br. in Opp. 16-22; Simon Supp. Cert. Br. in Response to Br. of U.S. 7-8), Iraq's opening brief addressed that issue in only three passing paragraphs (Iraq Open. Br. 32, 33-34). Iraq's reply brief now devotes nine pages to the issue (at 6-11, 13-15), necessitating a very short supplemental response to the new arguments and authorities it raises. *See* S. Ct. R. 25.5.

Contrary to Iraq's contention that Congress enacted Section 1503 to authorize the President to make "Section 1605(a)(7) inapplicable to Iraq and thus restor[e] Iraq's sovereign immunity to the status enjoyed by other U.S. allies" (Reply Br. 1), the relevant authority was a much more modest "proviso" to an "[e]mergency" wartime "[a]ppropriations" measure that was set to "expire" a mere seventeen months later. Congress did not in this fashion, for the first time ever, authorize the President to permanently withdraw Article III jurisdiction over pending lawsuits. Given that Baghdad had fallen only four days earlier and the Hussein regime had not surrendered, Iraq was not at that time remotely

on equal footing with "other U.S. allies." *Contra* Reply Br. 1. The statute's obvious purpose was instead simply to permit the President immediately and on an interim basis to lift certain sanctions that endangered Iraq's economic functioning. Iraq's assertion that Congress intended that Iraq – unlike any other nation, including our closest allies – would be *permanently* insulated from sanctions for terrorism is implausible.

Contrary to Iraq's contention that Section 1503 operates retroactively because the phrase "make inapplicable" is "unqualified" (Reply Br. 6), "make" is actually a prospective term that means "to cause (something) to exist" (Black's Law Dictionary 975 (8th ed. 2004)). Even Iraq admits that Congress intended Section 1503 to operate prospectively: Iraq explains that "past violators" of sanctions would still be "penalized" (Reply Br. 7) – *i.e.*, that Congress did not intend to permit the President to retroactively lift the sanctions and immunize previous violations. Iraq cannot explain how the same statutory language has retroactive effect when applied to claims under FSIA Section 1605(a)(7). When the United States removes a nation's designation as a terrorist state, it remains liable under the FSIA for its prior acts of torture; the same result obtains here. 28 U.S.C. § 1605(a)(7)(A) (repealed 2008); 2008 NDAA 28 U.S.C. § 1605A(a)(2)(A)(i)(I) (similar). By contrast, when Congress intends to eliminate the federal courts'

jurisdiction over previously filed claims for torture by terrorist states, it says so expressly.[1]

Contrary to Iraq's reliance on this Court's construction of the FSIA in *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004) (Reply Br. 6-8), the "make inapplicable" language of Section 1503 is not a provision of the FSIA but instead is a general statute subject to the ordinary presumption against retroactivity. Because Iraq seeks the dismissal of respondents' pending claims with prejudice (*contra* Reply Br. 11), the presumption is that Section 1503 operates only prospectively. *Hamdan v. Rumsfeld*, 548 U.S. 557, 576-77 (2006). In any event, sovereign immunity (which is an immunity from suit) is determined at the time of the claim is filed, not later (*Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003); *Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957)); and changes in a nation's status as terrorist state in particular have only prospective effect (*see supra*).

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[1] Libyan Claims Resolution Act, Pub. L. No. 110-301, § 5(b), 122 Stat. 2999, 3000-01 (2008) ("temporal scope" of restoration of Libya's immunity from claims under FSIA Section 1605(a)(7) upon Secretary of State's certification applies "regardless of whether, or the extent to which, application of that subsection affects any action filed before, on, or after that date"); National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(d)(2)(c), 122 Stat. 338, 344 (2008) ("temporal scope" of the President's power to "waive" application of the cause of action under FSIA Section 1605A to Iraq applies "regardless" of whether it would affect "any action filed before, on, or after the date of the exercise of that authority").

Finally, contrary to Iraq's assertion that the "*actions*" the President took under Section 1503 remain effective (Reply Br. 13 (emphasis in original)), on the date that the statutory "authorit[y]" for those actions "expire[d]" (117 Stat. 579 (eighth proviso)), the President's power to execute faithfully that law sunset as well (U.S. Const. art. II, § 3), and Section 1605(a)(7) became once again "[]applicable with respect to Iraq" (117 Stat. 579 (second proviso)). If the President's actions were actually permanent, there would have been no need, *after* the President exercised his authority, for (a) Congress to extend Section 1503's expiration date (*see* Pub. L. No. 108-106, § 2204(2), 117 Stat. 1209, 1230 (2003)), or (b) the Secretary of State to remove Iraq's designation as a terrorist state (*see* 69 Fed. Reg. 61,702 (2004)).

Iraq's examples of instances in which Congress "provided a limited period for the exercise of statutory waivers" that survived the authorizing statute's sunset (Reply Br. 14) are inapposite because each involves an act by the President (for example, granting citizenship) that confers a benefit or status that exists until affirmatively withdrawn. Other statutory authorizations to the President that are more analogous to Section 1503, because they regulate ongoing activity, sunset with their enacting statute.[2]

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[2] *See, e.g.*, 19 U.S.C. § 2466b (President's authority to grant preferential trade treatment for certain products originating in eligible sub-Saharan African countries); 42 U.S.C. § 1973b(a)(8) (Attorney General's authority to designate states as subject to preclearance requirements

For the foregoing reasons, as well as those set forth in respondents' opening briefs, the judgments should be affirmed.

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under Voting Rights Act); Pub. L. No. 108-136, § 1306, 117 Stat. 1392, 1661 (2003) (President's authority to waive limitations on funding for chemical weapons destruction facility in Russia); Pub. L. No. 110-417, § 219(c), 122 Stat. 4356, 4390 (2008) (Secretary of Defense's authority to provide funds for defense laboratories for research and development of technologies for military missions).

Supreme Court, U.S.
FILED
FEB 26 2009
OFFICE OF THE CLERK

Nos. 07-1090 and 08-539

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v.

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REPUBLIC OF IRAQ, ET AL., PETITIONERS

v.

ROBERT SIMON, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Republic of Iraq continues to be amenable to suit under the exception to foreign sovereign immunity contained in 28 U.S.C. 1605(a)(7).

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In the Supreme Court of the United States

No. 07-1090

REPUBLIC OF IRAQ, PETITIONER

v.

JORDAN BEATY, ET AL.

No. 08-539

REPUBLIC OF IRAQ, ET AL., PETITIONERS

v.

ROBERT SIMON, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

This case presents the question whether the President validly made inapplicable to Iraq a statute abrogating foreign sovereign immunity for designated state sponsors of terrorism. At the Court's invitation, the United States filed a brief supporting certiorari in No. 07-1090.

STATEMENT

1. Congress has imposed numerous sanctions on countries that support international terrorism. Section

620A of the Foreign Assistance Act of 1961 (FAA), 22 U.S.C. 2371, and Section 6(j) of the Export Administration Act of 1979 (EAA), 50 U.S.C. App. 2405(j), forbid foreign assistance and restrict exports to countries that the Secretary of State has determined have "repeatedly provided support for acts of international terrorism." 22 U.S.C. 2371(a); 50 U.S.C. App. 2405(j)(1)(A). The range of sanctions that flow from designation as a state sponsor of terrorism include the denial of visas, 8 U.S.C. 1735, military contracts, 10 U.S.C. 2327(b), fellowships, 15 U.S.C. 7410(b), and tax credits, 26 U.S.C. 901(j)(2)(A)(iv).

In 1996, Congress adopted the sanction at issue in this case—the abrogation of designated states' immunity from terrorism-related claims. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, establishes a general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," 28 U.S.C. 1604, subject to specifically enumerated exceptions, 28 U.S.C. 1605-1607. As originally enacted, the FSIA contained no exception to immunity for human rights violations, including torture. *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 362-363 (1993). In 1996, Congress abrogated that immunity for claims involving "torture, extrajudicial killing, aircraft sabotage, [or] hostage taking" but only by a "state sponsor of terrorism" designated under EAA Section 6(j) or FAA Section 620A. 28 U.S.C. 1605(a)(7)(A).

2. In September 1990, Iraq was designated a state sponsor of terrorism pursuant to EAA Section 6(j). 55 Fed. Reg. 37,793. As a consequence, Iraq became subject to the full panoply of sanctions identified above, including, after 1996, the abrogation of immunity from claims within the scope of 28 U.S.C. 1605(a)(7).

In November 1990, Congress independently determined that Iraq had "repeatedly provided support for acts of international terrorism." Iraq Sanctions Act of 1990 (ISA), Pub. L. No. 101-513, § 586F(c)(1), 104 Stat. 2051. The ISA mandated application to Iraq of all "provisions of law that impose sanctions against a country which has repeatedly provided support for acts of international terrorism." *Ibid.*

3. On March 19, 2003, a United States-led coalition began military operations against the regime of Saddam Hussein. As military operations progressed, Congress and the President took various steps to promote the United States' critical interest in the prompt stabilization and reconstruction of Iraq, including by making available Iraq's own resources to rebuild its essential public services.

As particularly relevant here, in April of that year, Congress enacted the Emergency Wartime Supplemental Appropriations Act, 2003 (EWSAA), Pub. L. No. 108-11, 117 Stat. 559. EWSAA Section 1503 authorized the President to "suspend the application of any provision of the [ISA]" and further provided, *inter alia*, that "the President may make inapplicable with respect to Iraq section 620A of the [FAA] or any other provision of law that applies to countries that have supported terrorism." 117 Stat. 579.

On May 7, 2003, the President exercised his Section 1503 authority by "suspend[ing] the application of all of the provisions" of the ISA, with the exception of penalties for embargo violators, and "mak[ing] inapplicable with respect to Iraq section 620A of the [FAA] and any other provision of law that applies to countries that have supported terrorism." Presidential Determination No. 2003-23, 3 C.F.R. 320 (2004). In a formal message to

Congress, the President specifically identified three statutes as among those made inapplicable to Iraq: the terrorism exception to immunity, "28 U.S.C. 1605(a)(7)," and two provisions relating to the execution of terrorism-related judgments against foreign state assets, "28 U.S.C. 1610, and Section 201 of the Terrorism Risk Insurance Act." *Message to the Congress Reporting the Declaration of a National Emergency with Respect to the Development Fund for Iraq*, 39 Weekly Comp. Pres. Doc. 647, 647-648 (May 26, 2003) (*Message to Congress*). The President observed that "[a] major national security and foreign policy goal of the United States" was "to ensure that * * * Iraqi resources * * * are dedicated for the well-being of the Iraqi people [and] for the orderly reconstruction and repair of Iraq's infrastructure." *Id.* at 647. He further explained that the entry or enforcement of judgments against Iraq would threaten "the national security and foreign policy of the United States" by "jeopardizing the full dedication of such assets to purposes benefitting the people of Iraq." *Ibid.*[1]

The President also took numerous other actions to ensure that Iraq's assets were available "to assist the Iraqi people and to assist in the reconstruction of Iraq." E.O. 13,290, 3 C.F.R. 192, 193 (2004) (vesting previously blocked Iraqi assets in the Department of the Treasury and directing their use to benefit Iraqis); see E.O.

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[1] On October 20, 2004, the Secretary of State rescinded Iraq's designation as a sponsor of terrorism. 69 Fed. Reg. 61,702. The Secretary observed that "nearly all the restrictions applicable to countries that have supported terrorism, including the application of 2[8] U.S.C. 1605(a)(7), were made inapplicable with respect to Iraq permanently in Presidential Directive No. 2003-23." *Ibid.* Nevertheless, the rescission was intended to strengthen "the partnership of the United States and Iraq." *Ibid.*

13,303, 3 C.F.R. 228, 228 (2004) (prohibiting any "judicial process" against the Development Fund for Iraq (DFI) and Iraqi petroleum products). The President explained that those steps were necessary because the "threat of attachment or other judicial process" against covered Iraqi assets "obstructs the orderly reconstruction of Iraq," and therefore "constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States." *Ibid.* The United States also worked through the United Nations to secure protections for Iraqi assets in other nations. See S.C. Res. 1483, U.N. Doc. S/RES/1483 ¶¶ 22, 23 (May 22, 2003) (granting "immunities equivalent to those enjoyed by the United Nations" to the DFI, Iraqi petroleum products, and other covered Iraqi governmental assets).

4. In *Acree* v. *Republic of Iraq*, 370 F.3d 41 (2004), cert. denied, 544 U.S. 1010 (2005), the District of Columbia Circuit ruled that the President lacked authority under EWSAA Section 1503 to make Section 1605(a)(7) inapplicable to Iraq. The majority described the question as "exceedingly close," but concluded that the authority conferred on the President did not encompass Section 1605(a)(7). *Id.* at 51. While acknowledging that a "straightforward" reading of the phrase "any other provision of law that applies to countries that have supported terrorism" includes Section 1605(a)(7), *id.* at 52 (quoting EWSAA § 1503, 117 Stat. 579), the majority held that Section 1503's authorization was implicitly limited to "obstacles to assistance and funding for the new Iraqi government," *id.* at 51. On the merits, the majority reversed the plaintiffs' nearly $1 billion judgment and dismissed for failure to state a claim. *Id.* at 58-60.

Then-Judge Roberts concurred in the dismissal, but on the jurisdictional grounds advanced by the United

States. *Acree*, 370 F.3d at 60. He observed that Section 1605(a)(7) is "on its face a 'provision of law that applies to countries that have supported terrorism,'" and he rejected the majority's inference of limitations circumscribing the President's authority. *Ibid.* He would have held "that the President was authorized to—and did, with the Presidential Determination—oust the federal courts of jurisdiction over Iraq in Section 1605(a)(7) cases." *Id.* at 63.

5. In December 2007, Congress passed a bill to amend the FSIA. The bill would have repealed 28 U.S.C. 1605(a)(7) and replaced it with a new terrorism exception to immunity, to have been codified as 28 U.S.C. 1605A. National Defense Authorization Act for Fiscal Year 2008, H.R. 1585, 110th Cong., 1st Sess. § 1083(b)(1)(A)(iii) (H.R. 1585); *id.* § 1083(a)(1). The bill also would have created a new federal cause of action against foreign states for terrorism-related injuries and permitted prejudgment liens and punitive damages. *Ibid.* The bill would have permitted certain suits brought under Section 1605(a)(7)—including suits with final judgments, such as *Acree*—to be converted into suits under the new provision. *Id.* § 1083(c)(2).

Despite the fact that the bill contained defense authorizations during a time of war, the President declined to sign it because, by undoing judgments favorable to Iraq and subjecting Iraq to new liability, Section 1083 of H.R. 1585 "would imperil billions of dollars of Iraqi assets at a crucial juncture in that nation's reconstruction efforts and because it would undermine the foreign policy and commercial interests of the United States." *Memorandum to the House of Representatives Returning Without Approval the "National Defense Authorization Act for Fiscal Year 2008,"* 43 Weekly Comp. Pres.

Doc. 1641, 1641 (Dec. 31, 2007) (*Return Memorandum*). Accordingly, the President withheld his approval of H.R. 1585. *Ibid.*

The Administration and Congress reached a compromise to address the President's concerns. Congress passed a revised bill adding a new provision authorizing the President to "waive any provision of [Section 1083] with respect to Iraq." National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, § 1083(d)(1), 122 Stat. 343. That provision also expressed the sense of Congress that the Executive should work with Iraq "on a state-to-state basis to ensure compensation for any meritorious claims" that could not be heard due to the President's waiver. *Id.* § 1083(d)(4), 122 Stat. 344.

On January 28, 2008, the same day the President signed the amended bill into law, he exercised his full authority under Section 1083(d) by "waiv[ing] all provisions of section 1083 of the Act with respect to Iraq." Presidential Determination No. 2008-9, 73 Fed. Reg. 6571.

6. Kenneth Beaty and William Barloon are American citizens taken hostage by the Hussein regime in the aftermath of the first Gulf War. 07-1090 Pet. App. 5a; *Daliberti* v. *Republic of Iraq*, 146 F. Supp. 2d 19, 25 (D.D.C. 2001). Beaty, Barloon, and their wives sued Iraq pursuant to Section 1605(a)(7) and were awarded more than $10 million. *Id.* at 20, 26. Their children, respondents in No. 07-1090, sued Iraq in 2003, also pursuant to Section 1605(a)(7), for emotional distress resulting from their fathers' captivity. 07-1090 Pet. App. 9a. Iraq filed a motion to dismiss for lack of jurisdiction, which the district court denied on the basis of *Acree*. *Id.*

at 17a, 20a-22a. The court of appeals summarily affirmed. *Id.* at 1a.

7. Respondents in No. 08-539 sued Iraq pursuant to Section 1605(a)(7) for hostage-taking and torture during the first Gulf War. 08-539 Br. in Opp. 2-3. The district court dismissed their suits as untimely. 08-539 Pet. App. 2a, 38a-48a. While their appeal was pending, Congress enacted the NDAA. *Id.* at 2a.

The court of appeals rejected petitioners' argument that the NDAA's repeal of Section 1605(a)(7) eliminated jurisdiction, concluding that Section 1605(a)(7) remains a valid basis for jurisdiction over cases pending when Congress enacted the NDAA. 08-539 Pet. App. 6a-8a. The court observed that Congress limited application of the amendments in NDAA Section 1083 "to any claim arising under section 1605A." *Id.* at 9a (quoting NDAA § 1083(c)(1), 122 Stat. 342). The court reasoned that claims pending under Section 1605(a)(7) did not "aris[e]" under the later-enacted Section 1605A and therefore could proceed as before. *Ibid.* The court also relied on the NDAA's "transition rules" that specifically addressed "pending cases." *Id.* at 10a-12a. On the merits, the court of appeals reversed, holding that respondents' suit was timely. *Id.* at 19a.

SUMMARY OF ARGUMENT

1. In the midst of rapid and dramatic changes in the United States' foreign policy toward Iraq, Congress granted the President authority to "make inapplicable with respect to Iraq section 620A of the [FAA] or any other provision of law that applies to countries that have supported terrorism." EWSAA § 1503, 117 Stat. 579. The exception to immunity provided in 28 U.S.C. 1605(a)(7) falls within the plain text of that grant of au-

thority to the President, because Section 1605(a)(7) applies only to countries designated by the Secretary of State as supporters of international terrorism and therefore is unquestionably a "law that applies to countries that have supported terrorism."

The court of appeals in *Acree* declined to give effect to the expansive text of EWSAA Section 1503, instead imposing an atextual limitation narrowing the President's authority under Section 1503 to statutes restricting funding for the new Iraqi government. That construction, based on the erroneous premise that each of Section 1503's provisos was dependent on the Section's opening clause relating to the ISA, is flawed and would deprive Section 1503 of its full intended affect. But, even on its own terms, the court of appeals' analysis fails, because, as the President determined, the threat of enormous judgments against Iraq based on the Hussein regime's terrorist acts *do* pose a threat to adequate funding for the new Iraqi government.

Although the statute's plain text is sufficient to resolve the question presented, the court of appeals compounded its error by failing to defer to the President's reasonable construction of Section 1503. Deference to the President is especially appropriate here, because the authorities conferred in Section 1503 relate to the Nation's policy toward another country in the midst of military operations, and the President has independent constitutional authorities and institutional expertise in such matters.

2. Although each party invokes NDAA Section 1083 to support its arguments, that provision is irrelevant to the question presented. Because the President had already rendered Section 1605(a)(7) inapplicable to Iraq in 2003, and because he immediately waived application

of NDAA Section 1083 with respect to Iraq upon its enactment, the NDAA has no effect on the proper resolution in this case. In the event the Court finds the NDAA relevant, the better construction of Section 1083—which continues to apply to other countries that sponsor terrorism—is that it does not deprive the courts of jurisdiction over suits brought pursuant to the exception to immunity in Section 1605(a)(7) before the NDAA's enactment.

ARGUMENT

I. THE PRESIDENT MADE FSIA SECTION 1605(a)(7) INAPPLICABLE TO IRAQ PURSUANT TO EWSAA SECTION 1503

The President's *Message to Congress* informing it of his actions to protect covered Iraqi assets from judicial process states explicitly that "28 U.S.C. 1605(a)(7)" was among those provisions of law he made inapplicable to Iraq in the exercise of his authority under EWSAA Section 1503. 39 Weekly Comp. Pres. Docs. at 647-648. Although the *Acree* majority characterized the question whether the President's Section 1503 authority encompassed Section 1605(a)(7) as "exceedingly close," 370 F.3d at 51, it afforded the President's construction of the statute no deference whatsoever. Under well-established principles, however, courts must defer to the reasonable construction of an ambiguous statute by an executive agency responsible for implementing it. *A fortiori* courts must afford the President at least the same measure of deference. That is especially so when the statute in question concerns the Nation's foreign policy, where the President has independent constitutional authorities and institutional expertise.

While the *Acree* court's failure to afford the President deference makes its error particularly glaring, the court was incorrect even to regard the statute as ambiguous. Under the plain terms of EWSAA Section 1503, Section 1605(a)(7) is a "provision of law that applies to countries that have supported terrorism," 117 Stat. 579, that the President was authorized to make inapplicable to Iraq. There is no basis to add limiting language beyond that used by Congress.

A. Under The EWSAA's Plain Terms, The President Had Authority To Render Section 1605(a)(7) Inapplicable To Iraq

1. Section 1605(a)(7) unquestionably qualifies as a "provision of law that applies to countries that have supported terrorism"

Section 1503 of the EWSAA contained several provisions addressing the web of sanctions that applied to Iraq because of the Hussein regime's sponsorship of international terrorism. That Section's opening clause authorized the President to "suspend the application of any provision of the [ISA]." 117 Stat. 579. The Section contains a number of additional provisions introduced by the word "*Provided*." *Ibid.* Section 1503's second proviso authorized the President to "make inapplicable with respect to Iraq section 620A of the [FAA] or *any* other provision of law that applies to countries that have supported terrorism." *Ibid.* (emphasis added). That provision unambiguously authorized the President to render inoperative as to Iraq any and all laws that apply specifically to countries designated as state sponsors of terrorism. See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever

kind.'") (quoting *Webster's Third New International Dictionary* 97 (1976)); *United States* v. *Monsanto*, 491 U.S. 600, 609 (1989) (the "comprehensive phrase—'*any* property'"—is "broad and unambiguous"). Section 1605(a)(7) abrogated foreign sovereign immunity for certain claims against "a state sponsor of terrorism" designated under EAA Section 6(j) or FAA Section 620A. 28 U.S.C. 1605(a)(7)(A). Thus, under the plain statutory text, Section 1605(a)(7) was one of those provisions applicable to state sponsors of terrorism that EWSAA Section 1503 authorized the President to render inapplicable to Iraq.

The *Acree* majority believed that the relevant similarity between FAA Section 620A and the "other" provisions referred to in Section 1503's second proviso was imposition of "obstacles to assistance and funding for the new Iraqi Government." 370 F.3d at 51. But the text of the statute expressly provides a different test of similarity—namely, whether the other provision of law is one that "applies to countries that have supported terrorism." EWSAA § 1503, 117 Stat. 579. By its terms, Section 1503's second proviso authorized the President to render inapplicable any and all of the myriad of sanctions that applied to Iraq as a result of the Hussein regime's sponsorship of terrorism and that the President determined would frustrate the Nation's new policy goals for Iraq. There is nothing in the text of Section 1503 to suggest that Congress intended any of the existing sanctions imposed on Iraq as a sponsor of terrorism, with the exception of certain arms-related prohibitions, to be beyond the President's authority. Notably, many of those sanctions do not relate to "assistance" or "funding," including, in addition to Section 1605(a)(7), the prohibition on exports, 50 U.S.C. App. 2405(j), and the de-

nial of visas to Iraqi nationals, 8 U.S.C. 1735. The *Acree* majority's cramped construction would have the effect of erroneously excluding those provisions from the President's Section 1503 authority. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998).

The *Acree* majority's limitation of Section 1503 as encompassing only "obstacles to assistance and funding," 370 F.3d at 51, is particularly unwarranted given that Congress makes such limitations express when it intends them. In another statute, enacted just two months before the EWSAA, Congress specified that a provision easing restrictions on assistance to nongovernmental organizations was inapplicable "to section 620A of the [FAA] or any *comparable* provision of law *prohibiting assistance* to countries that support international terrorism." Act of Feb. 20, 2003, Pub. L. No. 108-7, Div. E, § 537(c)(1), 117 Stat. 196 (emphases added). See 22 U.S.C. 2152c(a)(4)(B)(i) (excepting "section 2371 of [Title 22] or any comparable provision of law prohibiting assistance to countries that support international terrorism"). The contrast between those statutory provisions and Section 1503 demonstrates that "Congress knows how to use more limited language along the lines of the [*Acree*] majority's construction when it wants to," but chose not to do so in the EWSAA. *Acree*, 370 F.3d at 60 (Roberts, J., concurring).

2. No canon of construction warrants imposing unstated limitations onto Section 1503

a. In support of its narrow construction of Section 1503, the *Acree* majority invoked an interpretive presumption that "where statutory language is phrased as a proviso, * * * its scope is confined to that of the principal clause to which it is attached." 370 F.3d at 52-53.

The court determined that Section 1503's several provisos were merely "responsive to a specific aspect of the ISA or other statutes that are implicated by the suspension authority" regarding the ISA in the section's opening clause. *Id.* at 53. Respondents urge a similar reading, contending that the opening clause of Section 1503 "reveal[s] the full intended scope of § 1503," and that the rest of Section 1503's provisions merely "explain *how* the President is to suspend [the ISA]." 08-539 Br. in Opp. 27. Such attempts to shoehorn each of the Section 1503 provisos into an ISA-centered framework cannot be squared with the text or purposes of Section 1503.

Although provisos are sometimes dependent on a preceding clause, this Court has observed that "it is also possible to use a proviso to state a general, independent rule." *Alaska* v. *United States*, 545 U.S. 75, 106 (2005). Section 1503 was such a provision. Whereas the opening clause of Section 1503 authorized the President to suspend sanctions imposed on Iraq in the ISA, other provisions removed, or authorized the President to remove, legal sanctions applicable to Iraq *independent* of the ISA.

Respondents' analysis of Section 1503's provisos as merely "explain[ing] *how* the President is to suspend" the ISA, 08-539 Br. in Opp. 27, cannot, for example, account for the fourth proviso in Section 1503, which provides that "section 307 of the [FAA] shall not apply with respect to programs of international organizations for Iraq." 117 Stat. 579. FAA Section 307 specifies certain countries, including at that time Iraq, as to which the United States will withhold funding for international programs. 22 U.S.C. 2227. FAA Section 307 is a free-standing sanction against the countries it specifies, independent of whether they have also been designated as

sponsors of terrorism. See Act of Apr. 30, 1994, Pub. L. No. 103-236, § 431(a)(1), 108 Stat. 459. Thus, FAA Section 307's application to Iraq would not have been affected by the President's suspension of the ISA.

Like the fourth proviso, the second proviso in Section 1503 serves a function independent from that of the Section's opening clause. Even before the ISA's enactment, the Secretary of State had designated Iraq a sponsor of terrorism, which carried with it numerous sanctions, including those in FAA Section 620A and, after 1996, application of the FSIA's terrorism exception. Thus, without the second proviso, those sanctions that applied to Iraq due to the Secretary's designation would have remained, regardless of whether the President suspended the ISA under the opening clause. Clearly, Congress's purpose of removing the sanctions applicable to Iraq due to the Hussein regime's support of terrorism would have been frustrated if the EWSAA had not authorized the President to remove *both* the sanctions imposed directly under the ISA *and* those resulting from the Secretary's designation.

b. Even on its own terms, the *Acree* majority's analysis was flawed. The majority reasoned, 370 F.3d at 54, that Section 1503's second proviso was "responsive" to ISA Section 586F(c). Section 586F(c) mandated enforcement against Iraq of five enumerated statutes as well as "all other provisions of law that impose sanctions against a country which has repeatedly provided support for acts of international terrorism." ISA § 586F(c)(1) and (2), 104 Stat. 2051. The court determined that the statutes specifically enumerated in Section 586F(c) "deal with restrictions on assistance to state sponsors of terrorism" and that its "all other provisions" language was implicitly limited to other statutes relating to re-

strictions on assistance. *Acree*, 370 F.3d at 55. The court then concluded that a similar limitation is implied in the "any other provision of law" language in EWSAA Section 1503. *Ibid.*

That reasoning is flawed in two basic respects. The first concerns the *Acree* majority's interpretation of Section 586F(c) itself. While that Section did not specifically mention Section 1605(a)(7), which did not exist when the ISA was adopted, Congress's use of broad "all other provisions" language in Section 586F(c) readily encompasses new sanctions against terrorist states adopted after the ISA's enactment, including Section 1605(a)(7). Section 1605(a)(7), by exposing Iraq to billions of dollars in liability, is as much an "economic sanction[]" on a state sponsor of terrorism, *Acree*, 370 F.3d at 54, as some of the statutes specifically enumerated in ISA Section 586F(c). See, *e.g.*, International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 555, 99 Stat. 227 (regarding civil aviation boycott on sponsors of terrorism). Thus, even if the catch-all clause in ISA Section 586F(c) were relevant to interpreting EWSAA Section 1503, the *Acree* majority was wrong to conclude that ISA Section 586F(c) did not encompass Section 1605(a)(7). But, in addition, even if the *Acree* majority's restrictive reading of the "all other provisions of law" language in ISA Section 586F(c) were a correct interpretation of *that* statute, it would in no way warrant importing that limitation into the second proviso in Section 1503, which does not cross-reference Section 586F and does not contain the same set of enumerated statutes as Section 586F(c).

In any event, Section 1605(a)(7) *is* a statute that "present[s] obstacles to * * * funding for the new Iraqi Government" and therefore satisfies the *Acree* ma-

jority's own reading of the scope of EWSAA Section 1503. 370 F.3d at 51. As his *Message to Congress* explained, the President concluded that the "threat of attachment or other judicial process" against covered Iraqi assets posed an "unusual and extraordinary threat * * * to the national security and foreign policy of the United States" precisely because they "jeopardiz[e] the full dedication of such assets to purposes benefiting the people of Iraq," such as the "reconstruction and repair of Iraq's infrastructure" and "the costs of indigenous civilian administration." 39 Weekly Comp. Pres. Doc. at 647. The numerous other steps the President took to protect Iraqi assets from judicial process, see pp. 4-5, *supra*, further illustrate the centrality to the United States' policy goals toward Iraq in the immediate wake of the Hussein regime's removal of ensuring that Iraqi assets were utilized to stabilize Iraq. It was for this reason that the President singled out those statutes pertaining to the entry and execution of judgments against terrorist states, including FSIA Section 1605(a)(7), as among those he had rendered inapplicable to Iraq under EWSAA Section 1503. Thus, even under its narrowed reading of Section 1503, the *Acree* majority erred in refusing to defer to the President's determination that potentially billions of dollars in judgments would seriously undermine funding for the essential tasks of stabilizing and rebuilding Iraq.

c. Respondents raise two additional arguments for a narrow construction of EWSAA Section 1503. They contend that Section 1503 should not be read as authorizing the President to render FSIA Section 1605(a)(7) inapplicable to Iraq because Section 1503 was enacted as part of an appropriations bill, 08-539 Br. in Opp. 29-31, and because such a grant of authority would violate the

separation of powers, *id.* at 20-22. Neither argument is persuasive.

First, while respondents are correct that implied repeals of substantive laws are not lightly inferred from appropriations provisions, 08-539 Br. in Opp. 30, it is equally clear that "when Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.'" *United States* v. *Will*, 449 U.S. 200, 222 (1980) (quoting *United States* v. *Dickerson*, 310 U.S. 554, 555 (1940)). EWSAA Section 1503 itself says nothing about the appropriation or expenditure of federal funds, and certain of its provisions undeniably affect substantive provisions of law. See 117 Stat. 579 (regarding actions by United States representatives to international financial institutions). Other provisions of the EWSAA are also plainly substantive in nature. See, *e.g.*, § 2105, 117 Stat. 589 (amending 7 U.S.C. 6506 to permit labeling wild seafood as "organic").

Second, Congress's conferral on the President of authority to determine which sanctions to render inapplicable to Iraq, including the exception to foreign sovereign immunity in Section 1605(a)(7), raises no constitutional concerns. As this Court has noted, Congress may authorize the President to act "in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 324 (1936). EWSAA Section 1503 conferred on the President authority regarding sanctions against Iraq at a time when the Nation's foreign

policy was undergoing rapid and dramatic transformation. In such circumstances, broad delegations to the President are particularly appropriate. *Id.* at 320-322.

Nor is it problematic, as respondents contend (08-539 Br. in Opp. 20-21), that Congress authorized the President to render inapplicable a jurisdictional provision. From the Nation's founding until the FSIA's enactment, jurisdiction over claims against foreign sovereigns depended entirely on determinations by the Executive Branch. See, *e.g.*, *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 36 (1945). A statute transferring back to the Executive Branch a narrow portion of that authority does not violate the separation of powers.

3. Temporal considerations do not justify departing from the EWSAA's plain text

The *Acree* majority also suggested that questions regarding EWSAA Section 1503's temporal application weighed against construing it to reach Section 1605(a)(7). 370 F.3d at 56-57. But those concerns were misplaced. The majority believed that Section 1503's sunset provision would render inoperative Presidential Determination 2003-23 and revive Section 1605(a)(7). *Id.* at 57. But the phrase "make inapplicable" in the second proviso of EWSAA Section 1503, 117 Stat. 579, connotes a *permanent* effect of the President's action. See H.R. Conf. Rep. No. 337, 108th Cong., 1st Sess. 59 (2003) (noting that Presidential Determination 2003-23 had made terrorism-related laws "permanently inapplicable to Iraq"). Moreover, Section 1503's sunset provision provided that the President's "authorities" under that Section would expire, not that the President's *exercise* of those authorities within the requisite period would cease to have legal effect. When Congress wishes to eliminate

not only a grant of authority, but also the consequences of any valid exercise of that authority, Congress does so expressly. See, *e.g.*, Act of Oct. 25, 1999, Pub. L. No. 106-79, § 9001(a) and (c), 113 Stat. 1283 (providing for expiration of waiver authority and separately providing that "any waiver previously issued * * * shall cease to apply," upon the occurrence of a specified condition).

If the President's timely exercise of authority under Section 1503 ceased to have legal effect upon its sunset on September 30, 2005, then the ISA—which has never been repealed—would have once again become applicable to Iraq. But both the Executive and Congress have acted with the understanding that Presidential Determination 2003-23 continues to have effect. The Department of Commerce, for example, continues to permit export to Iraq of items that would not be permitted under the ISA if the President's exercise of his Section 1503 authorities had ceased to have effect upon the Section's sunset. See *Export and Reexport Controls for Iraq*, 69 Fed. Reg. 46,070 (2004).

Congress has likewise evidently understood that the President's exercise of his Section 1503 authorities did not cease to have effect. As noted, Congress never repealed the ISA. Congress did not believe such a repeal was necessary because the President's exercise of his Section 1503 authorities had already "ma[d]e *permanently inapplicable to Iraq* any provisions of law that apply to countries that support terrorism." H.R. Conf. Rep. No. 337, *supra*, at 59 (emphasis added).[2]

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[2] In contrast to the effect of the President's exercise of his authorities under Section 1503, Congress understood that the sanctions directly affected by EWSAA Section 1503, *i.e.*, the "laws referred to in [Section 1503's] fourth and fifth provisos," would have again become applicable to Iraq upon the Section's sunset, and Congress extended the

Nor, contrary to the *Acree* majority's suggestion (370 F.3d at 56), is it surprising that the President's exercise of his Section 1503 authority with respect to Section 1605(a)(7) would have an immediate effect on pending lawsuits against Iraq, in contrast to Section 1605(a)(7) itself, which provided that, when a country's designation was rescinded, courts would retain jurisdiction over claims that accrued during the time a country was designated. 28 U.S.C. 1605(a)(7)(A). As this Court has recognized, the decision to afford immunity to foreign sovereigns "reflects current political realities and relationships," and the courts therefore give effect "to the most recent such decision" by the political branches. *Republic of Austria* v. *Altmann*, 541 U.S. 677, 696 (2004). Given the seismic shift in the United States' political relationship with Iraq in early 2003, it is unremarkable that the specific decision to restore Iraq's immunity would be given immediate effect with respect to existing and prospective claims notwithstanding the general rule in Section 1605(a)(7)(A), rather than subject a new Iraqi government to crushing liability in our courts for the wrongs of the Hussein regime. Cf. Libyan Claims Resolution Act, Pub. L. No. 110-301, § 5(a)(1), 122 Stat. 3000 (rendering Sections 1605(a)(7) and 1605A immediately inapplicable to Libya upon receipt of funds sufficient to pay certain pending claims).[3]

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sunset date to ensure that those laws would remain inapplicable "through fiscal year 2005." H.R. Conf. Rep. No. 337, *supra*, at 59. See, *e.g.*, Act of May 11, 2005, Pub. L. No. 109-13, Div. A, § 2101, 119 Stat. 266 (amending FAA Section 307, 22 U.S.C. 2227, to delete Iraq from the list of states as to which the United States would withhold contributions to international organizations).

[3] When Congress enacted Section 1605(a)(7) in 1996, it likewise gave immediate effect to that change in policy by retroactively abrogating

B. Even If Section 1503 Were Not Clear, The President's Reasonable Construction Is Entitled To Great Deference

1. To the extent there is any doubt whether Section 1503 encompasses Section 1605(a)(7), the President has made clear his judgment that it does. The President fully exercised his Section 1503 authority in Presidential Determination No. 2003-23, in which he made inapplicable to Iraq FAA Section 620A "and any other provision of law that applies to countries that have supported terrorism." 3 C.F.R. at 320 (2004). In his formal *Message to Congress*, the President explicitly stated his conclu-

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the immunity of state sponsors of terrorism for all acts since their designations. Notably, Iraq was immune from respondents' claims in both Nos. 07-1090 and 08-539 at the time of their injuries. See *Nelson*, 507 U.S. at 362-363. When the United States' policy toward Iraq changed again, even more fundamentally, Iraq's immunity was restored and respondents were simply put back in the position they occupied at the time of their injuries.

Moreover, while reviving Iraq's immunity with respect to the exception in Section 1605(a)(7) means that respondents' claims cannot proceed in United States courts, their claims are not extinguished. Rather, terrorism-based claims have been returned to the realm of international diplomacy. Indeed, the United States and the Government of Iraq have recognized the desirability of resolving the claims of American nationals stemming from the Hussein regime's abuses. See Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, Nov. 17, 2008, Art. 26(1)(b) <http://www.mnf-iraq.com/images/Cgs_Messages/security_agreement.pdf>. In connection with a United Nations Security Council resolution extending the immunity of certain Iraqi assets from attachment, Iraq's Prime Minister similarly represented Iraq's interest in taking "measures necessary to settle * * * claims inherited from the previous regime." See S.C. Res. 1859, Annex at 4, U.N. Doc. S/RES/1859 (Dec. 22, 2008) (reproducing Dec. 7, 2008, letter from Iraqi Prime Minister).

sion that both Section 1503 and the Presidential Determination encompass "28 U.S.C. 1605(a)(7)." 39 Weekly Comp. Pres. Doc. at 647-648.

Because Congress entrusted implementation of Section 1503 to the President, and because the President has independent constitutional authority in the area of foreign affairs, the *Acree* majority erred in failing to afford any deference to his construction of that provision. The majority recognized that 28 U.S.C. 1605(a)(7) falls within the literal terms of EWSAA Section 1503, 370 F.3d at 52, and believed that the case presented "an exceedingly close question," *id.* at 51. In such circumstances, as then-Judge Roberts observed, well-established principles of judicial deference to the Executive's construction of ambiguous statutes should make this "an easy case." *Id.* at 63-64 n.2 (concurring).

There is no sound basis to deny deference to the President's reasonable exercise of a statutory authority entrusted to him, especially in the foreign affairs context where the President generally enjoys great leeway under our Constitution and laws. This Court has frequently noted its "customary policy of deference to the President in matters of foreign affairs." *Jama* v. *ICE*, 543 U.S. 335, 348 (2005); see *Regan* v. *Wald*, 468 U.S. 222, 243 (1984); *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981).

The Court has never addressed deference to Presidential construction of statutes within the specific framework of *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), but it has made clear that *Chevron*-type deference is appropriate with respect to regulations adopted in the exercise of statutory authority conferred on the President and delegated by him. See *Wald*, 468 U.S. at 226 & n.2, 243 (deference to regulations issued by the

Office of Foreign Assets Control pursuant to statutory authority granted to President and delegated to OFAC); cf. *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979) (Council on Environmental Quality, within the Executive Office of the President, "entitled to substantial deference" in its "interpretation of [the National Environmental Policy Act of 1969]," reflected in regulations adopted pursuant to Executive Order). There is simply no reason why the President's exercise of statutory authority granted him by Congress would receive less deference than the President's subordinates are shown when the President delegates authority to subordinate officers. That is especially so in the area of foreign affairs, in which the President enjoys considerable independent constitutional authority in addition to that granted to him by statute. *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 424 & n.14 (2003).

2. Respondents contend (08-539 Br. in Opp. 23-25) that other actions by the President are inconsistent with his position that Presidential Determination 2003-23 reinstated Iraq's immunity from the claims at issue here. Those arguments misconstrue the other Presidential actions upon which respondents rely.

Respondents contend (08-539 Br. in Opp. 23-24) that there would have been no need for Executive Order 13,303, which prohibits and nullifies certain legal action against the DFI and Iraqi petroleum products, if the President had already reinstated the immunity of Iraq that had been abrogated by Section 1605(a)(7). But respondents overlook the FSIA's other immunity exceptions, which were unaffected by Presidential Determination 2003-23. See, *e.g.*, 28 U.S.C. 1605(a)(2) (commercial activity exception); 28 U.S.C. 1610(a)(2) (related attachment provision). Executive Order 13,303 protects cov-

ered Iraqi assets from attachment under the still-applicable provisions of the FSIA.

Respondents further contend (08-539 Br. in Opp. 24-25) that the President's reference, in his message returning the first version of the NDAA without his approval, to the threat posed "by foreclosing defenses on which Iraq is relying in pending litigation," *Return Memorandum*, 43 Weekly Comp. Pres. Doc. at 1641, reflects the President's understanding that Presidential Determination 2003-23 had not affected the application of Section 1605(a)(7). But H.R. 1585 expressly contemplated that even suits under Section 1605(a)(7) that had been dismissed, such as the *Acree* litigation, could be revived by moving to convert them into actions under the new exception to foreign sovereign immunity invoking the new federal cause of action. H.R. 1585, § 1083(c)(2). Thus, the President's reference to the threat posed by H.R. 1585's attempt to foreclose certain defenses, such as res judicata, was entirely accurate and in no way inconsistent with his view that Presidential Determination 2003-23 had validly rendered Section 1605(a)(7) inapplicable to Iraq.

II. THE NDAA HAS NO EFFECT ON THE COURTS' JURISDICTION OVER RESPONDENTS' CLAIMS

Both petitioners and respondents invoke the NDAA to bolster their arguments with respect to the continued availability of Section 1605(a)(7) as a basis for jurisdiction over Iraq. Because the President immediately waived application of the NDAA with respect to Iraq upon its enactment, the NDAA has no effect on the proper resolution of this case. To the extent the Court finds it relevant, however, the better construction of the NDAA is that it does not deprive the courts of jurisdic-

tion over suits brought pursuant to the exception to immunity in Section 1605(a)(7) before the NDAA's enactment.

A. The NDAA Has No Effect On The Courts' Jurisdiction Over Respondents' Claims Because The President Waived The NDAA With Respect To Iraq

Contrary to the parties' arguments, the NDAA has no effect on the courts' jurisdiction over respondents' claims. For the reasons stated above, the President's exercise of his authority under EWSAA Section 1503 had *already* permanently rendered Section 1605(a)(7) inapplicable to Iraq before the NDAA's enactment. To the extent NDAA Section 1083 purported to allow such claims to be asserted against Iraq under the newly enacted Section 1605A, the President's immediate exercise of his authority under NDAA Section 1083(d)(1) to waive application of Section 1083 to Iraq precludes that course as well. See Presidential Determination No. 2008-9, 73 Fed. Reg. at 6571. Accordingly, there is presently no jurisdictional basis for asserting terrorism-based claims against Iraq.

Petitioners make a further argument (Pet. Br. 37-49) that, independent of the President's exercise of his authorities under EWSAA Section 1503, the courts now lack jurisdiction over respondents' claims because NDAA Section 1083(b)(1)(A)(iii), 122 Stat. 341, repealed Section 1605(a)(7). That contention is mistaken.

Because the President categorically waived its application to Iraq, NDAA Section 1083 has no effect at all on the legal status quo with regard to Iraq in place prior to the NDAA's enactment—that is, Section 1083 has no effect on the availability *vel non* of jurisdiction over respondents' claims against Iraq under Section 1605(a)(7).

The President immediately waived application to Iraq of "all provisions" of Section 1083—necessarily including both its adoption of the new 28 U.S.C. 1605A and its repeal of 28 U.S.C. 1605(a)(7)—pursuant to the authority specially granted to the President in response to his withholding of his consent to H.R. 1585. See Presidential Determination No. 2008-9, 73 Fed. Reg. at 6571 ("waiv[ing] all provisions of section 1083 of the Act with respect to Iraq").

The President and Members of Congress who were the leading proponents of the NDAA reached a compromise to enable the rapid enactment of the NDAA. Under the compromise, it was understood that the President would exercise his waiver authority under Section 1083(d)(1), and claims against Iraq would be left in the same position as before H.R. 1585 passed Congress. The NDAA contained hundreds of pages of other time-sensitive national security and defense authorities. The compromise permitted the expeditious passage of the broader NDAA, days after Congress's return following the President's withholding of his approval of H.R. 1585, without the delay that would have accompanied consideration of whether or how to adjust the legal status quo with regard to Iraq. See 154 Cong. Rec. E47 (daily ed. Jan. 17, 2008) (statement of Rep. Conyers) (President's exercise of his NDAA waiver authority would not affect "ongoing litigation" regarding the susceptibility of Iraq to suit "under current law").

B. NDAA Section 1083(c)(4)'s Characterization Of The Scope Of The President's Authorities Under EWSAA Section 1503 Is Entitled To No Weight

Like petitioners, respondents also rely on NDAA Section 1083, despite the President's waiver of that provision with respect to Iraq. Respondents cite (07-1090 Br. in Opp. 11; 08-539 Br. in Opp. 24 n.28) NDAA Section 1083(c)(4), which states that "[n]othing in section 1503 of [EWSAA] has ever authorized, directly or indirectly, the making inapplicable of any provision of [the FSIA], or the removal of the jurisdiction of any court of the United States." 122 Stat. 343. Respondents' reliance on Section 1083(c)(4) is misplaced. Section 1083(c)(4) was adopted by a different Congress five years after the President exercised his authority under EWSAA Section 1503—well after Section 1503 had expired—and Section 1083(c)(4)'s application to Iraq was immediately waived by the President. It therefore should be afforded no weight in interpreting EWSAA Section 1503.[4]

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[4] Respondents in No. 08-539 contend (Br. in Opp. 31-35) that the Presidential waiver under NDAA Section 1083(d)(1) is inoperative because the original H.R. 1585, which had no waiver provision, became law. Because Congress's adjournment prevented the bill's return within the meaning of Article I, Section 7, Clause 2 of the Constitution, the President's withholding of approval constituted a "pocket veto." *Return Memorandum*, 43 Weekly Comp. Pres. Doc. at 1642. But even assuming that the President had the ability to return the bill without his approval under Article I, Section 7, Clause 2, he also properly effected a return veto. Respondents do not contest that the President returned the bill to the Clerk of the House of Representatives with his objections within ten days (excluding Sundays) of being presented with the bill. That is all the Constitution requires for a return veto. See U.S. Const. Art. I, § 7. Accordingly, H.R. 1585 did not become law, as both Congress and the President recognized in enacting the NDAA.

This Court has observed that "the views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any, significance.'" *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968) (citation omitted). Although later enactments substantively amending a law can affect the construction of other terms in the original statute, see *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969), NDAA Section 1083(c)(4) did not amend EWSAA Section 1503 and the authorities contained in Section 1503 had in any event *expired* on September 30, 2005. See Act of Nov. 6, 2003, Pub. L. No. 108-106, § 2204(2), 117 Stat. 1230. Section 1083(c)(4) therefore is merely a statement through which the 110th Congress sought to express its view about an already-expired statute enacted five years earlier by a different Congress. But even assuming that Section 1083(c)(4) as conceived had some substantive effect, it could not "establish[] * * * federal law" (07-1090 Br. in Opp. 7) because it applied only to Iraq and the President immediately waived it, along with the rest of Section 1083, as to Iraq.

If the Court were to give any credence to post-enactment history, it should instead look to the action of the same Congress that enacted the EWSAA. The President's *Message to Congress* informed Congress that Section 1605(a)(7) was among the provisions he had made inapplicable to Iraq under EWSAA Section 1503. 39 Weekly Comp. Pres. Doc. at 647-648. Later that year, the same Congress that enacted EWSAA Section 1503 extended the authorities contained in that Section for an additional year without expressing any disagreement with the President's action. Act of Nov. 6, 2003, Pub. L. No. 108-106, § 2204(2), 117 Stat. 1230. Because Congress focused on Section 1503 when extending it, Con-

gress's failure to disapprove of the President's exercise of his authorities under that provision is "significant" and reflects the 108th Congress's understanding that the President acted within his statutory authority. *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 600-601 (1983).

C. Although Rendered Inapplicable To Iraq, Section 1605(a)(7) Remains Available As A Basis For Jurisdiction Over Suits Against Other Designated States Pending Before The NDAA's Enactment

For the reasons explained above, NDAA Section 1083 does not affect the proper resolution of the question of jurisdiction over these suits against Iraq. The question of the NDAA's effect on pending cases does, however, arise with respect to suits against other designated states, as to which Section 1083's application has not been waived. To the extent the Court finds it helpful, in light of the parties' arguments, to understand how Section 1083 applies to such pending suits, the position of the United States is that the NDAA does not deprive the courts of jurisdiction over suits pending at the time of the NDAA's enactment pursuant to the immunity exception in Section 1605(a)(7).

1. Although petitioners invoke the "default rule" that jurisdictional repeals have immediate effect on pending cases, Pet. Br. 39, there is no need to resort to presumptions in this case. NDAA Section 1083 speaks directly to its "[a]pplication to [p]ending [c]ases." NDAA § 1083(c), 122 Stat. 342. Congress provided that, with respect to "[p]ending [c]ases," *ibid.*, "[t]he amendments made by this section shall apply to any claim arising under [28 U.S.C.] 1605A," § 1083(c)(1), 122 Stat. 342. Congress's use of the phrase "claim arising under sec-

tion 1605A," *ibid.*, is significant. It is well-established that "[a] suit arises under the law that creates the cause of action," *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U.S. 257, 260 (1916), and the cause of action "arising under section 1605A" to which NDAA Section 1083(c)(1) refers, 122 Stat. 342, is the new federal cause of action created by 28 U.S.C. 1605A(c), NDAA § 1083(a)(1), 122 Stat. 339. Thus, under the plain text of NDAA Section 1083(c)(1), the amendment striking 28 U.S.C. 1605(a)(7) does not apply to pending cases brought under the immunity exception in Section 1605(a)(7) that do not assert the new federal cause of action in 28 U.S.C. 1605A(c).

Congress further specified that those plaintiffs with "[p]ending [c]ases" under the immunity exception in Section 1605(a)(7) who wished to invoke the benefits of Section 1605A had to move to convert their suits or file related actions under the new provision. NDAA § 1083(c)(2) and (3), 122 Stat. 342-343; §1083(c)(2)(C), (3)(A) and (B), 122 Stat. 343 (requiring that such motions or related actions be filed within specified periods after the NDAA's enactment or "the entry of judgment in the original action"). Congress did not, however, require every plaintiff with a pending suit under Section 1605(a)(7) to move to convert or file a related action under Section 1605A. It merely provided an option for plaintiffs who would find it advantageous, such as those who had "been adversely affected on the grounds that" federal law prior to the NDAA's enactment "fail[ed] to create a cause of action against the state," § 1083(c)(2)(A)(iii), 122 Stat. 342, and therefore wished to have their suit treated as though "the action had originally been filed under [the new cause of action in] section 1605A(c)," § 1083(c)(2), 122 Stat. 342-343;

§ 1083(c)(2)(B)(ii), 122 Stat. 343 (providing for waiver of defenses when a related action "is refiled under section 1605A(c)").

2. Petitioners' contrary arguments are not persuasive. Petitioners contend that application of the "default rule" that jurisdictional repeals have immediate effect on pending cases is appropriate with respect to NDAA Section 1083 because that provision both repealed the old immunity exception for state sponsors of terrorism and "simultaneously *replaced* it with a new jurisdictional provision that covers *every* pending Section 1605(a)(7) case." Pet. Br. 39, 41. But it would be very odd for Congress to require every plaintiff with a suit pending under a particular jurisdictional provision to refile simply because Congress gave that provision another section number, such as if 28 U.S.C. 1331 were redesignated 28 U.S.C. 1331A.

Here, though, Congress's amendment did more, which explains the refiling provision. The new Section 1605A combines an immunity exception, very much like the old one in Section 1605(a)(7), with numerous new substantive and procedural provisions, such as the creation of a new federal cause of action in Section 1605A(c). In that unusual situation, Congress understandably provided that only those plaintiffs with pending cases who chose to invoke the new cause of action under Section 1605A were required to take affirmative steps to convert or refile their actions. With respect to those plaintiffs with "[p]ending [c]ases" who chose not to assert a "claim arising under section 1605A," Congress provided that "[t]he amendments made by [NDAA Section 1083]" would not apply, NDAA § 1083(c)(1), 122 Stat. 342, and their suits would continue under the pre-

viously existing exception to immunity in Section 1605(a)(7).

Petitioners challenge that analysis as "nonsensical." Pet. Br. 45. Petitioners contend that, under that interpretation, NDAA Section 1083(c)(2)(A), which allows conversion of pending cases that were adversely affected by the prior absence of a federal cause of action, would not apply to the very cases it was intended to address because such plaintiffs did not assert causes of action under 1605A. *Ibid.* But petitioners are mistaken. Once a plaintiff in the circumstances described in Section 1083(c)(2)(A) files a motion to have his case treated as one "filed under section 1605A(c)," NDAA § 1083(c)(2), 122 Stat. 343, that plaintiff *has* raised a "claim arising under section 1605A," § 1083(c)(1), 122 Stat. 342, and the provisions of NDAA Section 1083 would apply to that motion.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 2009

APPENDIX

1. Emergency Wartime Supplemental Appropriations Act, 2003, Pub. L. No. 108-11, § 1503, 117 Stat. 579, provides:

The President may suspend the application of any provision of the Iraq Sanctions Act of 1990: *Provided*, That nothing in this section shall affect the applicability of the Iran-Iraq Arms Non-Proliferation Act of 1992 (Public Law 102-484), except that such Act shall not apply to humanitarian assistance and supplies: *Provided further*, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism: *Provided further*, That military equipment, as defined by title XVI, section 1608(1)(A) of Public Law 102-484, shall not be exported under the authority of this section: *Provided further*, That section 307 of the Foreign Assistance Act of 1961 shall not apply with respect to programs of international organizations for Iraq: *Provided further*, That provisions of law that direct the United States Government to vote against or oppose loans or other uses of funds, including for financial or technical assistance, in international financial institutions for Iraq shall not be construed as applying to Iraq: *Provided further*, That the President shall submit a notification 5 days prior to exercising any of the authorities described in this section to the Committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives: *Provided further*, That not more than 60 days after enactment of this Act and every 90 days thereafter the President shall

submit a report to the Committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives containing a summary of all licenses approved for export to Iraq of any item on the Commerce Control List contained in the Export Administration Regulations, 15 CFR Part 774, Supplement 1, including identification of end users of such items: *Provided further*, That the authorities contained in this section shall expire on September 30, 2004, or on the date of enactment of a subsequent Act authorizing assistance for Iraq and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first.

2. Iraq Sanctions Act of 1990, Pub. L. No. 101-513, Tit. V, 104 Stat. 2047, provides in pertinent part:

* * * * *

SEC. 586F. **DECLARATIONS REGARDING IRAQ'S LONG-STANDING VIOLATIONS OF INTERNATIONAL LAW.**

* * * * *

(c) SUPPORT FOR INTERNATIONAL TERRORISM.—(1) The Congress determines that Iraq is a country which has repeatedly provided support for acts of international terrorism, a country which grants sanctuary from prosecution to individuals or groups which have committed an act of international terrorism, and a country which otherwise supports international terrorism. The provisions of law specified in paragraph (2) and all other provisions of law that impose sanctions against a country which has

repeatedly provided support for acts of international terrorism, which grants sanctuary from prosecution to an individual or group which has committed an act of international terrorism, or which otherwise supports international terrorism shall be fully enforced against Iraq.

(2) The provisions of law referred to in paragraph (1) are—

(A) section 40 of the Arms Export Control Act;

(B) section 620A of the Foreign Assistance Act of 1961;

(C) sections 555 and 556 of this Act (and the corresponding sections of predecessor foreign operations appropriations Acts); and

(D) section 555 of the International Security and Development Cooperation Act of 1985.

* * * * *

SEC. 586G. SANCTIONS AGAINST IRAQ.

(a) IMPOSITION.—Except as provided in section 586H, the following sanctions shall apply with respect to Iraq:

(1) FMS SALES.—The United States Government shall not enter into any sale with Iraq under the Arms Export Control Act.

(2) COMMERCIAL ARMS SALES.—Licenses shall not be issued for the export to Iraq of any item on the United States Munitions List.

(3) EXPORTS OF CERTAIN GOODS AND TECHNOLOGY.—The authorities of section 6 of the Export Administration Act of 1979 (50 U.S.C. App. 2405) shall be used to prohibit the export to Iraq of any goods or technology listed pursuant to that section or section 5(c)(1) of that Act (50 U.S.C. App. 2404(c)(1)) on the control list provided for in section 4(b) of that Act (50 U.S.C. App. 2403(b)).

(4) NUCLEAR EQUIPMENT, MATERIALS, AND TECHNOLOGY.—

(A) NRC LICENSES.—The Nuclear Regulatory Commission shall not issue any license or other authorization under the Atomic Energy Act of 1954 (42 U.S.C. 2011 and following) for the export to Iraq of any source or special nuclear material, any production or utilization facility, any sensitive nuclear technology, any component, item, or substance determined to have significance for nuclear explosive purposes pursuant to section 109b. of the Atomic Energy Act of 1954 (42 U.S.C. 2139(b)), or any other material or technology requiring such a license or authorization.

(B) DISTRIBUTION OF NUCLEAR MATERIALS.—The authority of the Atomic Energy Act of 1954 shall not be used to distribute any special nuclear material, source material, or byproduct material to Iraq.

(C) DOE AUTHORIZATIONS.—The Secretary of Energy shall not provide a specific authorization under section 57b. (2) of the Atomic Energy Act of 1954 (42 U.S.C. 2077(b)(2)) for any activity

that would constitute directly or indirectly engaging in Iraq in activities that require a specific authorization under that section.

(5) ASSISTANCE FROM INTERNATIONAL FINANCIAL INSTITUTIONS.—The United States shall oppose any loan or financial or technical assistance to Iraq by international financial institutions in accordance with section 701 of the International Financial Institutions Act (22 U.S.C. 262d).

(6) ASSISTANCE THROUGH THE EXPORT-IMPORT BANK.—Credits and credit guarantees through the Export-Import Bank of the United States shall be denied to Iraq.

(7) ASSISTANCE THROUGH THE COMMODITY CREDIT CORPORATION.—Credit, credit guarantees, and other assistance through the Commodity Credit Corporation shall be denied to Iraq.

(8) FOREIGN ASSISTANCE.—All forms of assistance under the Foreign Assistance Act of 1961 (22 U.S.C. 2151 and following) other than emergency assistance for medical supplies and other forms of emergency humanitarian assistance, and under the Arms Export Control Act (22 U.S.C. 2751 and following) shall be denied to Iraq.

(b) CONTRACT SANCTITY.—For purposes of the export controls imposed pursuant to subsection (a)(3), the date described in subsection (m)(1) of section 6 of the Export Administration Act of 1979 (50 U.S.C. App. 2405) shall be deemed to be August 1, 1990.

* * * * *

No. 08-539

IN THE

Supreme Court of the United States

REPUBLIC OF IRAQ, ET AL.,

Petitioner,

v.

ROBERT SIMON, ET AL.,

Respondents.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

Brief of *Amicus Curiae*
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INTEREST OF *AMICUS CURIAE*

This *amicus* brief is respectfully submitted in support of Respondents by the Center for Justice & Accountability.[1]

The Center for Justice & Accountability (CJA) is a non-profit legal advocacy center that works to prevent torture and other severe human-rights abuses around the world by helping survivors hold their perpetrators accountable. CJA represents survivors and their families in actions for redress that call for the application of human-rights standards under U.S. and international law. Thus, its participation will assist this Court in understanding the profound implications of this case.

As recognized by the D.C. Circuit in *Simon v. Republic of Iraq*, 529 F.3d 1187 (D.C. Cir. 2008), the Republic of Iraq does not possess

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[1]No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties in No. 08-539 have consented to the filing of this brief and such consents are being lodged herewith.

sovereign immunity in this case. The Respondents, who were subjected to torture by the Republic of Iraq, therefore, have the right to bring their lawsuit pursuant to the state-sponsor-of-terrorism provision of the Foreign Sovereign Immunities Act.

SUMMARY OF ARGUMENT

In 1996, Congress adopted legislation amending the Foreign Sovereign Immunities Act (FSIA) to allow claims against countries that are designated state sponsors of terrorism. 28 U.S.C. § 1605(a)(7). The FSIA eliminated state immunity for several acts—torture, extrajudicial killing, hostage taking, and aircraft sabotage—that are specifically prohibited under international law. In 2003, when this lawsuit was filed, the Republic of Iraq was a designated state sponsor of terrorism. As such, it was subject to the Section 1605(a)(7) waiver of immunity.

In 2008, Congress amended the FSIA through the adoption of the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, 122 Stat. 3. Section 1083 of the NDAA replaced 28 U.S.C. § 1605(a)(7) with more detailed provisions but reiterated the key provision that a foreign state "designated as a state sponsor of terrorism at the time" an act of torture, extrajudicial killing,

hostage taking, or aircraft sabotage occurred "shall not be immune" from a suit for damages in the federal courts. *See* 28 U.S.C. § 1605A.

The NDAA also included a provision authorizing the President to waive any provision of Section 1083 of the NDAA with respect to Iraq if he made certain determinations. President Bush subsequently invoked this power by waiving "all provisions of section 1083 with respect to Iraq, and all agencies and instrumentalities thereof." Presidential Determination No. 2008-9, 73 Fed. Reg. 6,571, 6,571 (Jan. 28, 2008).

The Republic of Iraq has asserted that the NDAA and the President's invocation of Section 1083 authority require the dismissal of this case. The decision of the Court of Appeals below, however, that neither the NDAA nor the President's invocation of Section 1083 authority with respect to Iraq deprives the courts of jurisdiction was a straightforward application of statutory-construction principles that should be affirmed.

Principles of statutory construction compel a similar finding with respect to the Emergency Wartime Supplemental Appropriations Act (EWSAA), Pub. L. No. 108-11, 117 Stat. 559, 579 (2003). The Republic of Iraq has also argued that the EWSAA made the state-sponsor-of-terrorism exception to the FSIA inapplicable to Iraq. In *Acree v. Republic of*

Iraq, 370 F.3d 41 (D.C. Cir. 2004), the D.C. Circuit disagreed, holding that Section 1503 of the EWSAA did not apply to the FSIA terrorism exception. As that court held, the EWSAA was designed to provide economic assistance to Iraq and was not meant to address the jurisdiction of the federal courts.

Although these decisions of the Court of Appeals were correctly decided on their own terms, there is an additional reason why they should be affirmed: the venerable doctrine of statutory construction that federal law must not be interpreted in a manner that conflicts with international law if any other construction is fairly possible. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

Under international law, victims of torture have a right to seek redress for their injuries. The D.C. Circuit's decisions, which construe the NDAA and EWSAA as continuing to allow victims of torture to seek such redress in the federal courts, are consistent with these principles of international law.

A contrary interpretation of these statutes would bring the United States into conflict with international law. Like the Court of Appeals, this Court should construe the NDAA and EWSAA in a manner that renders them consistent with international law and, accordingly, affirm the decisions below.

ARGUMENT

I. UNDER INTERNATIONAL LAW, VICTIMS OF TORTURE HAVE A RIGHT TO SEEK REDRESS FOR THEIR INJURIES

Few international norms are more firmly established than the prohibition against torture. This prohibition is recognized in every major human-rights instrument, including treaties ratified by the United States. *See, e.g.*, Universal Declaration of Human Rights, art. 5, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); International Covenant on Civil and Political Rights, art. 7, 999 U.N.T.S. 171 (entered into force March 23, 1976); [2] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), art. 2, 1465 U.N.T.S. 85 (entered into force June 26, 1987).[3]

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[2]As of March 18, 2009, there are 164 States Parties to the International Covenant on Civil and Political Rights. The United States has ratified the International Covenant.

[3]As of March 18, 2009, there are 146 States Parties to the Convention against Torture. The United States has ratified the Convention against Torture.

The prohibition against torture is set forth in the 1949 Geneva Conventions, which the United States has ratified.[4] *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, arts. 3, 13, 130, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 3, 32, 147, 75 U.N.T.S. 287 (entered into force Oct. 31, 1950). It is also codified in several regional human-rights agreements. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953);[5] American Convention on Human Rights, art. 5(2), 1144 U.N.T.S. 123 (entered into force July 18, 1978);[6] African Charter on Human and Peoples' Rights, art. 5, OAU Doc. CAB/LEG/67/3/rev.5 (entered into force Oct. 21,

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[4]As of March 18, 2009, there are 194 States Parties to the 1949 Geneva Conventions. The United States has ratified the Geneva Conventions.

[5]As of March 1, 2009, there are 47 States Parties to the European Convention.

[6]As of March 1, 2009, there are 25 States Parties to the American Convention. The United States has signed (but not ratified) the American Convention.

1986).[7]

Each of these international instruments makes clear that the prohibition against torture is absolute. It allows for no derogation.[8] "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." Convention against Torture, art. 2(2).

Attached to the prohibition against torture is a concomitant obligation to ensure that victims obtain redress for their injuries and have an enforceable right to fair and adequate compensation. The Convention against Torture, which has been ratified by the United States, requires states to provide redress for victims of

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[7]As of March 1, 2009, there are 53 States Parties to the African Charter.

[8] This principle has been affirmed by numerous international tribunals, including the European Court of Human Rights (*Selmouni v. France*, 29 Eur. H.R. Rep. 403 (1999); *Aksoy v. Turkey*, 23 Eur. H.R. Rep. 553 (1997); *Ireland v. United Kingdom*, 2 Eur. H.R. Rep. 25 (1978)); the Inter-American Court of Human Rights (*Case of Lori Berenson Mejia v. Peru*, 2004 Inter-Am. Ct. H.R. (ser. C) No. 119 (Nov. 25, 2004)); and the International Criminal Tribunal for the former Yugoslavia (*Prosecutor v. Furundzija*, Case No. IT-95-17/1-T (Oct. 2, 1995)).

torture. Article 14 provides that "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."

The Committee against Torture, which is authorized to monitor and review state compliance with the Convention against Torture, has stated that states have an obligation to provide civil compensation to victims of torture in all cases. In its 2005 report on Canada, for example, the Committee stated that Canada "should review its position under article 14 of the Convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture." Committee against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusion and Recommendations of the Committee against Torture: Canada*, ¶ 5(f), U.N. Doc. CAT/C/CR/34/CAN (July 7, 2005).

The right of victims to seek redress for their injuries is also recognized in the International Covenant on Civil and Political Rights, which the United States has also ratified. Article 2(3) provides that each State Party to the Covenant undertakes: "(a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy,

notwithstanding that the violation has been committed by persons acting in an official capacity; (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) to ensure that the competent authorities shall enforce such remedies when granted." *See also* Universal Declaration of Human Rights, art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.").

The right of victims to seek redress for their injuries was set forth in the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which were adopted by the United Nations General Assembly in 2005. G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005). The Basic Principles provide that victims of gross violations of international human-rights law are entitled to "(a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; [and] (c) access to relevant

information concerning violations and reparation mechanisms." *Id.* at ¶ 11.

Pursuant to the Basic Principles, States are obligated to "[p]rovide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice . . . irrespective of who may ultimately be the bearer of responsibility for the violation." *Id.* at ¶ 3(c). Compensation for victims "should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case." *Id.* at ¶ 20. Such damages may include physical or mental harm, lost employment, material damages and loss of earnings, moral damage, and costs required for legal or expert assistance. Other forms of reparation include restitution, rehabilitation, satisfaction, and guarantees of non-repetition. Because the Basic Principles were adopted by the United Nations General Assembly, they offer another indication of the status of international law.

U.S. law recognizes the right of torture victims to seek redress for their injuries. In 1991, Congress adopted the Torture Victim Protection Act to comply with the Convention against Torture, which was signed by the United States in 1988 and ratified in 1994. *See* 28 U.S.C. § 1350 (note). The Torture Victim Protection Act establishes civil liability for

torture perpetrated by an individual "under actual or apparent authority, or color of law, *of any foreign nation*." *Id.* § 2(a) (emphasis added). The Torture Victim Protection Act's definition of torture is based on the Convention against Torture.

Both the House and Senate reports on the statute acknowledged that remedies should be available in the United States for victims of torture. *See generally* H.R. Rep. No. 102-367 (1991); S. Rep. No. 102-249 (1991). The House Report, for example, states that the Convention against Torture obligates states "to provide means of civil redress to victims of torture." H.R. Rep. No. 102-367, at 3. Access in our courts to judicial redress is important because

> [j]udicial protections against flagrant human rights violations are often least effective in those countries where such abuses are most prevalent. A state that practices torture and summary execution is not one that adheres to the rule of law. The general collapse of democratic institutions characteristic of countries scourged by massive violations of fundamental rights rarely leaves the judiciary intact. The Torture Victim Protection Act would respond to this situation.

Id. (citation omitted).

The state-sponsor-of-terrorism exception to

foreign sover eign immunity in the FSIA was also adopted to provide victims with a right of redress. The FSIA removes state immunity from civil liability for torture, extrajudicial killing, hostage taking, and aircraft sabotage. Each of these acts is specifically prohibited by international law. Torture is defined in the FSIA by reference to the TVPA, which based its definition of torture on the Convention against Torture. 28 U.S.C. § 1605A(h)(7).[9] Thus, the decision to waive state immunity for acts of torture was based on the prohibited nature of torture under international law and the right of victims to seek redress for such acts.

In sum, the right to a remedy is a fundamental principle of international law. Victims of torture have a right to seek redress for their injuries.

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[9]Hostage taking and aircraft sabotage are defined in the FSIA by reference to treaties that the United States has ratified, further attesting to the international law foundations of the FSIA exceptions. *See* 28 U.S.C. § 1605A(h)(1) and (2).

II. U.S. LAW SHOULD BE INTERPRETED IN A MANNER CONSISTENT WITH INTERNATIONAL LAW WHENEVER POSSIBLE

This Court has long recognized the doctrine of statutory construction that federal statutes must not be interpreted in a manner that conflicts with international law if any other construction is fairly possible.[10] This doctrine applies to both customary international law and treaties. Indeed, U.S. courts have demanded an expression of clear intent before they will conclude that Congress intended to supersede international law in any of its statutes. *Restatement (Third) of Foreign Relations Law of the United States* § 115(1)(a) (1987); *see also* Louis Henkin, *Foreign Affairs and the U.S. Constitution* 486 (2d ed. 1996). International law is not to be used as a means for overriding domestic law; rather, courts are urged to harmonize domestic and international law whenever possible.

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[10]The phrase "where fairly possible" derives from one of the principles of interpretation to avoid serious doubts as to the constitutionality of a federal statute. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-48 (1936); *Restatement (Third) of Foreign Relations Law of the United States* § 114 rpt. n.2.

This Court's decision in *Talbot v. Seeman*, 5 U.S. 1 (1801), represents, perhaps, the first elaboration of this principle of statutory construction. In *Talbot*, the Court, per Chief Justice Marshall, held that "the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law." *Id.* at 43.

The doctrine, however, is more generally attributed to a case decided three years later, *Murray v. Schooner Charming Betsy*, in which this Court considered whether an Act of Congress adopted to suspend trade between the United States and France authorized the seizure of neutral vessels, an action that would violate customary international law. In February 1800, Congress adopted the Non-Intercourse Act to suspend all commerce between the United States and France. In July 1800, Captain Alexander Murray of the U.S. frigate Constellation captured the schooner Charming Betsy while it was bound for the island of Guadalupe, a French dependency. At the time of its capture, the Charming Betsy was owned by a Danish burgher who had been born in the United States. Alleging a violation of the Non-Intercourse Act, Captain Murray confiscated the cargo and the vessel. The district court declared the seizure illegal and the court of appeals affirmed. Before this Court,

the principal issue was whether "the Charming Betsy was subject to seizure and condemnation for having violated a law of the United States?" *Id.* at 118.

Writing for the Court, Chief Justice Marshall enunciated a doctrine of statutory construction that affirmed the importance of international law:

> It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.
>
> These principles are believed to be correct, and they ought to be kept in view in construing the act now under consideration.

Id. In light of these principles, Chief Justice Marshall considered whether the Non-Intercourse Act applied to neutral vessels.

> If it was intended that any American vessel sold to a neutral should, in the possession of that neutral, be liable to the commercial disabilities imposed on her while she belonged to citizens of the United States, such extraordinary intent ought to have been

> plainly expressed; and if it was designed to prohibit the sale of American vessels to neutrals, the words placing the forfeiture on the intent with which the sale was made ought not to have been inserted.

Id. at 119. Finding no clear indication that Congress intended the Non-Intercourse Act to abrogate norms of international law, the Court concluded that the Charming Betsy, as the property of a foreign citizen, was not forfeitable even though it was employed in carrying on trade and commerce with a French island.

In *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), this Court considered the extraterritorial reach of the Sherman Act and whether it violated customary international law. While the majority opinion did not explicitly address the *Charming Betsy* doctrine, Justice Scalia acknowledged and affirmed its relevance in his dissenting opinion, which was joined by Justices O'Connor, Kennedy, and Thomas:

> [The *Charming Betsy* doctrine] is relevant to determining the substantive reach of a statute because "the law of nations," or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe. Though it clearly has constitutional authority to do so, Congress is generally presumed not to have

> exceeded those customary international law limits on jurisdiction to prescribe.

Id. at 815 (citation omitted). Accordingly, Justice Scalia reasoned that "even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." *Id.*

Although this doctrine of statutory construction goes back virtually to the founding of our nation, it is neither an historical anomaly nor an isolated extrapolation. To the contrary, it is a long-standing doctrine of statutory construction that has been affirmed by this Court in numerous decisions. *See, e.g.*, *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 178 n.35 (1993); *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934); *Cook v. United States*, 288 U.S. 102, 120 (1933); *United States v. Payne*, 264 U.S. 446, 448-49 (1924); *MacLeod v. United States*, 229 U.S. 416, 434 (1913); *Brown v. United States*, 12 U.S. 110, 125 (1814).

Significantly, the *Charming Betsy* doctrine also forms the basis of the constitutional-avoidance doctrine of statutory construction, which holds that

> where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy*, and has for so long been applied by this Court that it is beyond debate.

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trade Council, 485 U.S. 568, 575 (1988) (citations omitted); *see also* Justice Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. Int'l L. & Pol. 35, 38 (1997) (describing Chief Justice Marshall's opinion in *The Charming Betsy* as an "early exposition of interpretive principles that would define our jurisprudence").

The *Charming Betsy* doctrine of statutory construction applies to both customary international law and treaties. In *Chew Heong v. United States*, 112 U.S. 536 (1884), the Court considered whether immigration restrictions adopted by Congress in the Chinese Restriction

Act were inconsistent with a treaty between the United States and China. In 1880, the United States and China entered into the treaty, which regulated the rights of Chinese nationals to enter and remain in the United States. In 1882, Congress adopted the Chinese Restriction Act, which placed certain restrictions on the entry of "Chinese laborers." An action for deportation of one such laborer required the Court to determine whether Congress had intended to violate the "stipulations of a treaty, so recently made with the government of another country." *Id.* at 539.

Writing for the Court, Justice Harlan emphasized the importance of treaties and the profound implications that arise when a country violates an international obligation:

> Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact, that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question

was enacted.

Id. at 540. Reviewing the treaty language and subsequent federal legislation, the Court refused to override the treaty absent explicit congressional authorization.

> When the act of 1882 was passed, Congress was aware of the obligation this government had recently assumed, by solemn treaty, to accord to a certain class of Chinese laborers the privilege of going from and coming to this country at their pleasure. Did it intend, within less than a year after the ratification of the treaty, and without so declaring in unmistakable terms, to withdraw that privilege by the general words of the first and second sections of that act? Did it intend to do what would be inconsistent with the inviolable fidelity with which, according to the established rules of international law, the stipulations of treaties should be observed? These questions must receive a negative answer.

Id. at 550.

In *Weinberger v. Rossi*, 456 U.S. 25 (1982), this Court considered whether a 1971 federal statute superseded an executive agreement entered into between the United States and the Philippines, the 1968 Base Labor Agreement (BLA). The statute prohibited employment

discrimination at military installations except where a "treaty" provided otherwise. The Court confronted the question of whether Congress had intended the statute's exception for treaties to encompass executive agreements such as the BLA.

Writing for a unanimous Court, then-Justice Rehnquist concluded that the treaty exception extended to executive agreements and, therefore, the discrimination exemption applied to the BLA. Because the statute implicated this international agreement, Justice Rehnquist recognized the role of the *Charming Betsy* doctrine. Accordingly, "some affirmative expression of congressional intent to abrogate the United States' international obligations is required." *Id.* at 32.

Reviewing the legislative history of the affected statute, the Court found no "support whatsoever for the conclusion that Congress intended in some way to limit the President's use of international agreements that may discriminate against American citizens who seek employment at United States military bases overseas." *Id.* at 33. Accordingly, the Court held that the international agreements were not superseded by the subsequent federal legislation.

In *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1983), this Court considered whether Congress had sought to

override the provisions of the Warsaw Convention regulating international air travel by repealing the Par Value Modification Act (PVMA) in 1978. Adopted in 1929, the Warsaw Convention established a limit on air-carrier liability for lost cargo, which was a gold-based liability regime. The United States ratified the Warsaw Convention in 1934, thereby accepting that regime for calculating air-carrier liability. In 1978, however, Congress repealed the PVMA, which had set an official price for gold in the United States. The Court was thus asked to "determine whether the 1978 repeal of legislation setting an 'official' price of gold in the United States renders the Convention's gold-based liability limit unenforceable in this country." *Id.* at 245.

Writing for the Court in an 8-1 ruling, Justice O'Connor recognized that "[t]here is, first, a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action." *Id.* at 252. Justice O'Connor found it significant that Congress had not specifically referenced the Warsaw Convention in its deliberations concerning the Par Value Modification Act.[11]

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[11] While Justice Stevens dissented from the Court's ruling, he did not disagree with Justice O'Connor's analysis of the *Charming Betsy* doctrine. Indeed, Justice

"Legislative silence is not sufficient to abrogate a treaty. Neither the legislative histories of the Par Value Modification Acts, the history of the repealing Act, nor the repealing Act itself, make any reference to the Convention." *Id.* (citation omitted). Accordingly, the Court concluded that the treaty provisions remained enforceable in the United States.

This doctrine of statutory construction is based, in part, upon comity, a respect for other nations, and the law which binds the international community. It is also influenced

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Stevens reiterated the importance of ensuring that treaty interpretation in domestic courts does not violate the terms of the treaty. "Constructions of treaties yielding parochial variations in their implementation are anathema to the *raison d'etre* of treaties, and hence to the rules of construction applicable to them." *Trans World Airlines*, 466 U.S. at 263 (Stevens, J. dissenting); *see also Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) ("It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended."); *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902).

by considerations of foreign policy. In *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21 (1963), the Court concluded that the *Charming Betsy* doctrine required it to construe the National Labor Relations Act consistent with a "well-established rule of international law." *Id.* at 21; *see also Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957). To do otherwise, the Court found, would have negative foreign policy implications.

Finally, the *Charming Betsy* doctrine is guided by concern for the separation of powers and, in particular, respect for the constitutional roles of the Executive and Legislative branches of government in formulating foreign policy. Because the coordinate branches can state whether they seek to abrogate international law, courts will not question the commitment of those branches to international law unless such intent is clearly manifest. *Chew Heong*, 112 U.S. at 540.

When faced with ambiguous statutes, the division of power among the federal branches is best served by interpreting such statutes so as not to violate international law. Moreover, courts should be particularly cautious when engaging in statutory construction that may affect U.S. compliance with its international obligations. *See generally* Roger Alford, *Foreign Relations as a Matter of Interpretation: The Use*

and Abuse of Charming Betsy, 67 Ohio St. L.J. 1339 (2006) (asserting that the *Charming Betsy* doctrine promotes separation of powers by eschewing potential international law violations through statutory interpretation).

Under international law, victims of torture have a right to seek redress for their injuries. The United States has recognized this right through its ratification of the Convention against Torture as well as the International Covenant on Civil and Political Rights. Indeed, this right of redress for torture victims is further recognized under customary international law.

The FSIA state sponsor of terrorism exception effectuates the right of torture victims to seek redress for their horrific injuries. There is no indication that Congress specifically sought to abrogate the international norms underpinning the FSIA exception when it enacted the EWSAA or NDAA. The D.C. Circuit's interpretation of the NDAA in *Simon v. Republic of Iraq* is therefore consistent with the *Charming Betsy* doctrine. The D.C. Circuit's interpretation of the EWSAA in *Acree v. Republic of Iraq* is likewise consistent with the doctrine. These decisions should, therefore, be affirmed.

CONCLUSION

International law holds that victims of torture should have the right to seek redress for their injuries in U.S. courts. The D.C. Circuit's decisions are consistent with international law and should be affirmed

March 25, 2009 Respectfully Submitted

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In the Supreme Court of the United States

REPUBLIC OF IRAQ, PETITIONER,
v.
JORDAN BEATY, ET AL., RESPONDENTS.

REPUBLIC OF IRAQ, PETITIONER,
v.
ROBERT SIMON, ET AL., RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF ELEVEN MEMBERS OF CONGRESS, WASHINGTON LEGAL FOUNDATION, VETERANS UNITED FOR TRUTH, NATIONAL VETERANS ORGANIZATION OF AMERICA, AND ALLIED EDUCATIONAL FOUNDATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici include nonprofit organizations and a group of distinguished United States Representatives and Senators.

Amicus curiae the Washington Legal Foundation ("WLF") is a national nonprofit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF regularly appears in this Court and lower federal courts as *amicus curiae* supporting a strong national security and defense. WLF filed an amicus brief in support of the petition for certiorari in *Acree v. Iraq*, No. 04-820, also addressing issues relating to the terrorism exception under the Foreign Sovereign Immunities Act.

Amicus curiae Veterans United for Truth, Inc. is a nonprofit organization dedicated to serving the interests of both current military personnel and veterans. Veterans United for Truth works to improve the accession, training, equipping, and commitment of active-duty and reserve force military; to ensure that all persons active, reserve, and guard are told the truth about the reasons for their commitment to specific conflicts, and the truth about their obligations; to work to ensure that the dependents of all persons on active duty receive services in a timely fashion; and to work for legislation that guarantees benefits to all veterans without undue administrative complexity. The group believes that the courthouse doors

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

should remain open to veterans who claim to have been tortured while serving in the armed forces.

Amicus curiae the Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study and has appeared as *amicus curiae* in this Court on a number of occasions. AEF supports efforts to ensure that American citizens have the means to seek judicial redress when they are intentionally harmed by terrorists and/or supporters of terrorism.

Amicus curiae the National Veterans Organization of America ("NVOA") is a nonprofit organization dedicated to the preservation and enhancement of the rights of veterans. It has more than 5,000 members nationwide, consisting primarily of disabled veterans. A primary focus of NVOA is ensuring that veterans are provided forums that allow for speedy recovery of service-connected injuries.

United States Representative Bruce Braley (D, IA-01), serves on the House Energy and Commerce Committee. United States Representative Joe Sestak (D, PA-07), serves on the House Armed Services Committee. United States Representative Barbara Lee (D, CA-09), serves on the House Foreign Relations Committee. United States Representative Hank Johnson (D, GA-04), serves on the House Armed Services and Judiciary Committees. United States Representative Steve Kagen (D, WI-08), serves on the House Agriculture and Transportation Committees. United States Representative Debbie Wasserman Schultz (D, FL-20), serves on the House Appropriations and Judiciary Committees. United States Representative Jim McGovern (D, MA-03), serves on the House Rules and Budget

Committees. United States Representative Bob Filner (D, CA-51), chairs the House Committee on Veterans' Affairs. United States Representative Peter Welch (D, VT) serves on the House Committee on Energy and Commerce. United States Senator Tom Harkin (D, IA), chairs the Senate Agriculture, Nutrition, and Forestry Committee. United States Senator Frank R. Lautenberg (D, NJ) serves on the Senate Appropriations Committee.

This case presents questions of great importance regarding the jurisdiction of courts in the United States to hear claims against foreign governments for acts of terror or hostage-taking. Here, based upon a careful examination of the statutory provisions at issue, the United States Court of Appeals for the District of Columbia Circuit permitted Respondents' claims against the Republic of Iraq to go forward. The court followed its earlier holding in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), ruling that the 2003 statutory grant of authority to the President under the Emergency Wartime Supplemental Appropriations Act ("EWSAA") to suspend the application to Iraq of provisions of law that applied to countries that have supported terrorism did not extend to the jurisdictional provisions of section 1605 of the Foreign Sovereign Immunity Act ("FSIA"). The court also held that the 2008 amendment of section 1605 and new section 1605A do not apply retroactively to deprive the courts of jurisdiction over these cases. *Amici* respectfully submit that the statutory analysis of the court of appeals should be affirmed by this Court.

Congress has repeatedly and consistently expressed its outrage over the torture, hostage-taking and killing of American citizens carried out by the former government of Iraq and by other countries designated as state sponsors of terrorism. Since 1996 Congress has passed a

series of laws not only aimed at punishing and deterring terrorist acts, but also at providing a means of obtaining compensation and restitution for American citizens who have been the victims of such acts. Overturning the decisions by the court of appeals as to the statutory interpretation and application of section 1503 of EWSAA and section 1605A of the FSIA would severely undercut the right of the Plaintiffs-Respondents in these cases to seek redress and compensation for personal injuries caused by acts of torture and terrorism directed at Americans.

SUMMARY OF ARGUMENT

This Court should affirm the determinations by the court of appeals that section 1503 of the EWSAA did not authorize the President to abolish the jurisdiction of the courts in actions against Iraq under section 1605(a)(7) of the FSIA and that section 1605(a)(7) continues to provide jurisdiction over cases that were pending at the time of the 2008 amendment of section 1605 and enactment of new section 1605A.

The court of appeals correctly held in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1010 (2005), *followed in Simon v. Republic of Iraq*, 529 F.3d 1187 (D.C. Cir. 2008), *cert. granted sub nom. Republic of Iraq v. Simon*, 128 S. Ct. 894 (2009), that the language of section 1503 authorizing the President to make inapplicable to Iraq "any other provision of law that applies to countries that have supported terrorism" must be interpreted in light of the statute as a whole and its purposes. *Acree*, 370 F.3d at 54. Accordingly, the court determined that "any other provision" should be read to mean provisions that, like the provisions specifically enumerated in section 1503, call for economic sanctions and prohibit grants of assistance to state sponsors of terrorism. *Id.* As the court

further concluded, the terrorism exception found in section 1605(a)(7) is not such a provision and is not so similar to such provisions as to come within the scope of section 1503. In so holding, the court of appeals took note of the fact that the EWSAA was enacted at the request of President Bush to provide emergency supplemental appropriations to support Department of Defense operations in Iraq and that section 1503 appeared in Chapter 5 of the EWSAA, a chapter whose central function was to provide for relief and reconstruction in post-war Iraq.

The court of appeals also rejected Petitioner's contention that the recodification of the terrorism exception in new section 1605A of the FSIA and the repeal of section 1605(a)(7) ousted the jurisdiction of the courts in cases already pending under section 1605(a)(7). Likewise, the court held that the authority granted to the President to waive any provision of section 1605A and of section 1083 of the National Defense Authorization Act for Fiscal Year 2008, which enacted section 1605A, did not extend to section 1605(a)(7) and did not permit the President to waive jurisdiction as to cases already pending under section 1605(7). These conclusions, with which the United States as *amicus curiae* concurs, are based upon a careful and correct analysis of the statutory language and should be affirmed by this Court.

In making these determinations, the court of appeals did not rely upon any presumptions as to the retroactivity or non-retroactivity of statutory amendments to the jurisdiction of the courts. However, *amici* submit that retroactive application of the statutes in question would impair existing rights of the Plaintiffs-Respondents and that therefore, in the absence of any clear expression by Congress that these statutes should apply retroactively, these statutes are presumptively non-retroactive.

For these reasons, as set forth more fully below, *amici* respectfully urge that the Court affirm the determination of the court of appeals that the courts continue to have jurisdiction over these cases under section 1605(a)(7) of the FSIA.

ARGUMENT

I. THE EWSAA DID NOT AUTHORIZE SUSPENSION OF SECTION 1605(a)(7) WITH RESPECT TO IRAQ

The Court of Appeals for the District of Columbia Circuit correctly held in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), that section 1503 of the EWSAA did not authorize the President to suspend the application of section 1605(a)(7) of the FSIA and correctly followed that precedent in the case at bar.

Applying long established principles of statutory interpretation, the court of appeals concluded that section 1503, "read in the context of the EWSAA as a whole and its legislative history, is aimed at legal provisions that present obstacles to assistance and funding for the new Iraqi Government and was not intended to alter the jurisdiction of the federal courts under the FSIA." *Acree*, 370 F.3d at 51 (citing *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)).

Section 1503 of the EWSAA granted the President authority to suspend the application of any provision of the Iraq Sanctions Act of 1990. Pub. L. No. 108-11, 117 Stat. 559, 579. That grant of authority is contained in the main clause of section 1503. *Id.* ("The President may suspend the application of any provision of the Iraq Sanctions Act of 1990.") That single main clause is followed by eight provisos, each of which is introduced by the words "provided" or "provided further." It is the second of these subordinate

clauses or provisos that contains the language at issue: "Provided further, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 *or any other provision of law that applies to countries that have supported terrorism.*" *Id.* (emphasis added). Further provisos state, *inter alia*, that "section 307 of the Foreign Assistance Act of 1961 shall not apply with respect to programs of international organizations for Iraq" and that "provisions of law that direct the United States Government to vote against or oppose loans or other uses of funds, including for financial or technical assistance, in institutional financial institutions for Iraq shall not be construed as applying to Iraq." *Id.*

Petitioner Iraq seeks to have this Court read the words "any other provision of law that applies to countries that have supported terrorism" as reaching so broadly as to include the jurisdictional provisions of the FSIA, which give the courts in the United States jurisdiction to hear claims for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act.

Petitioner's argument for an expansive meaning to the words "any other provision" runs afoul of the canons of statutory interpretation that require a statutory phrase to be read and interpreted with reference to the statute as a whole, with regard to not only the meaning of the word or phrase but also its "'placement and purpose in the statutory scheme.'" *See Holloway v. United States*, 526 U.S 1, 6 (1999) (citation omitted); *see also King*, 502 U.S. at 221. The grammatical structure and context of the statute require limiting the meaning of "any other provision of law that applies to countries that have supported terrorism" as the court of appeals did in its decision in *Acree*. As the court pointed out in its

opinion, each of the provisos of section 1503 are "responsive" to the authority provided in the main clause of the statute to suspend the application of the Iraq Sanctions Act. 370 F.3d at 54. Each proviso either facilitates or defines and limits that authority and/or identifies further specific statutes whose applicability to Iraq may be suspended. As the court of appeals noted, the specific statutory provisions identified in Section 1503 are all statutes that sanction countries that support terrorism by imposing limits and restrictions on economic aid and assistance. Accordingly, the "grammatical and logical scope" of the statutory phrase "any other provision of law that applies to countries that have supported terrorism" confines its meaning to the "subject-matter of the principal clause," *United States v. Morrow*, 266 U.S. 531, 534-35 (1925), that is, to provisions imposing economic sanctions on Iraq or preventing aid and assistance to Iraq.

The broad reading of the statutory phrase "and any other provision of law . . . " proposed by Petitioners would make that language the most significant language in the statute, giving far reaching effects to a single phrase in an ancillary clause, and improperly rendering superfluous much of the rest of the statute. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001) ("'Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'" (citation omitted)). In particular, there would have been no need to list out in the statute specific provisions that the President was authorized to make non-applicable to Iraq, if the intent was to allow the President to make non-applicable any statute whatsoever that applied to countries that support terrorism. *See Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73, 78-79 (1990) (rejecting interpretation of statute that would "render[] the section's careful enumeration of subjects superfluous"; residual clause should not

"swallow[] what precedes it").

If Congress had intended the expansive meaning urged by Petitioner Iraq, the statute could simply have authorized the President to suspend the application to Iraq of any provision of law applicable to countries that support terrorism. *Cf. Arcadia*, 498 U.S. at 78. Instead, through its listing of specific provisions of law, section 1503 makes clear that its exclusive focus is to permit the President to move quickly to set aside economic sanctions against Iraq and to remove legal impediments to the provision of economic aid and assistance to Iraq. Thus, the phrase in section 1503 "and any other provision of law . . . " should be interpreted as "confined to the class" of statutes expressly enumerated in light of the nature of the provisions of law expressly enumerated in the section. *See, e.g., Cleveland v. United States*, 329 U.S. 14, 17-18 (1946) (construing the words "any other immoral purpose" in the statutory phrase "for the purpose of prostitution or debauchery, or for any other immoral purpose" as confined to category of immoral purposes of like kind to prostitution and debauchery).

Both the majority opinion in *Acree* and the dissenting opinion by then Judge Roberts agreed that the EWSAA was not entirely clear and the question of statutory interpretation was "close." *See Acree*, 370 F.3d at 51; *see also id.* at 62 (Roberts, J., dissenting in part). The majority found, however, that the legislative history of the EWSAA bolstered their conclusion that the EWSAA did not provide authority for suspending section 1605(a)(7).

The EWSAA was enacted, pursuant to President Bush's request

> for supplemental appropriations that would provide funds to cover military

> operations, relief and reconstruction activities in Iraq, ongoing operations in the global war on terrorism, enhancements to the safety of U.S. diplomats and citizens abroad, support for U.S. allies critical to succeeding in the war, and homeland security protection and response measures.

Letter from George W. Bush, President of the U.S., to J. Dennis Hastert, Speaker of the House of Representatives, and Accompanying Materials, at 3 (March 25, 2003), *available at* http://www.whitehouse.gov/omb/budget/amendments/supplemental_3_25_03.pdf.

Accompanying the President's letter was, *inter alia*, draft language for what ultimately was passed into law as section 1503, along with an explanation of the provision. The draft language proposed by the President is substantially similar, although not identical to the provision ultimately enacted. The accompanying explanation for the provision stated:

> This provision would repeal the Iraq Sanctions Act of 1990, which requires the President to continue an embargo on Iraq and impose certain mandatory sanctions against Iraq, including prohibitions on arms sales, certain exports, foreign assistance and Export-Import Bank Credits. It would also authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act.

Id. at 38. Significantly, neither the President's draft language nor the explanation even hints at the possibility that the President would attempt to use the statute to prevent suits against Iraq under section 1605(a)(7) of the FSIA.

In attempting to bring section 1605(a)(7) within the category of statutes affected by section 1503, Petitioner Iraq and *amicus* the United States repeatedly refer to the terrorism exception to the FSIA as a "sanction." *See, e.g.*, Pet. Br. at 19, 27; United States Am. Br. at 2, 12, 15, 16. It is plain, however, that the terrorism exception, while concededly having some penalizing or deterrent effect, is primarily aimed at providing compensation and relief for victims of terrorism.

The terrorism exception was added to the FSIA in 1996, as part of "Title II—Justice for Victims" of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241 (1996). The legislative history of the terrorism exception, while recognizing that the provision would have a deterrent effect, indicates that the provision will "provide[] vital remedies for victims" and "a responsible avenue for victims to seek just compensation." 142 Cong. Rec. S3463 (daily ed. Apr. 17, 1996) (statement of Senator Brown). Likewise, as Representative Fox stated:

> We cannot tolerate support for terrorism from foreign governments. No member of the community of nations should condone or assist such reprehensible violence. And no foreign state should be able to hide behind its immunity as a sovereign government to avoid having to pay the consequences of supporting terrorism. Accordingly, I introduced H.R. 1877, the State-Sponsored Terrorism Responsibility Act *to allow American victims to have a means of redress in the courts.*

142 Cong. Rec. H2141-42 (daily ed. Mar. 13, 1996) (statement of Rep. Fox) (emphasis added).

Thus, the court of appeals in *Acree* properly rejected the argument that the terrorism

exception to the FSIA was simply another sanction that was "similar in nature to the legal restrictions on assistance to Iraq that are enumerated elsewhere in § 1503" and therefore fell "within the scope of provisions the President is authorized to make inapplicable to Iraq." *Acree*, 370 F.3d at 57. As the court of appeals recognized, section 1605(a)(7) is "largely dissimilar" to the "'look-alike' provisions" expressly made subject to the President's authority under section 1503. *Id.*

Section 1605(a)(7) is not only dissimilar to the other provisions explicitly listed in section 1503, but, as Congress has made clear, is also legislation in an area of particular concern to Congress. It is implausible to suggest that Congress – without debate or discussion – intended to alter fundamentally the scope and application of section 1605(a)(7) with respect to Iraq through section 1503's residual clause "and any other provision of law." Section 1503 should not be construed to produce that result. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not . . . hide elephants in mouseholes.").

Indeed, Congress has now removed any doubt as to the correctness of the holding of the court of appeals on this issue. Section 1083 of the National Defense Authorization Act for Fiscal Year 2008 ("NDAA") includes the following statutory provision:

> Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

Pub. L. No. 110-181, § 1083(c)(4), 122 Stat. 3, 343 (2008). This formal and explicit declaration of the meaning of section 1503, contained in "subsequent *legislation*" with respect to which "Congress has proceeded formally through the legislative process," is entitled to "'great weight'" in the construction of section 1503. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980) (citation omitted); *see also Loving v. United States*, 517 U.S. 748, 770 (1996) (citing cases). As the court of appeals held, section 1503 did not empower the President to abolish the jurisdiction of the courts in these cases.

II. SECTION 1605A OF THE FOREIGN SOVEREIGN IMMUNITY ACT DOES NOT APPLY TO THESE CASES

The terrorism exception to foreign sovereign immunity has now been recodified in new section 1605A. 28 U.S.C. § 1605A. Section 1605A is similar to its predecessor, section 1605(a)(7), but is as the court of appeals noted, "more advantageous to plaintiffs in several respects."[2] Pet. App. at 322. Section 1083 of the NDAA, the Act that sets forth new section 1605A, grants the President authority to "waive any provision of this section with respect to Iraq," Pub. L. No. 110-181, § 1083(d)(1), 122 Stat. at 343. President Bush exercised that authority. Petitioner Iraq now contends that, in pending cases brought under old section 1605(a)(7), the courts' only source of jurisdiction is now new section 1605A

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[2] Section 1605A precludes a foreign state from filing an interlocutory appeal under the "collateral order" doctrine, § 1605A(f), permits a plaintiff to attach property in advance of judgment, § 1605A(g), and creates a federal right of action against foreign states, for which punitive damages may be awarded, § 1605A(c), thus abrogating *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004).

and that, the President having waived the application of section 1605A to cases against Iraq, the courts no longer have jurisdiction to hear these cases. The court of appeals properly rejected that contention, as should this Court.[3]

As the court of appeals held, section 1083's references to and provisions regarding pending cases, read in light of the whole of sections 1083 and 1605A, make clear that section 1605(a)(7) continues to provide the courts with jurisdiction to hear cases brought and still pending under that section.

First, in subsection (c), entitled "Application to Pending Cases," section 1083 states: "IN GENERAL. –The amendments made by this section shall apply to any claim arising under section 1605A of title 28, United States Code." § 1083(c)(1), 122 Stat. at 342. As the court of appeals pointed out, claims previously filed under and pending under section 1605(a)(7) did not "aris[e] under" section 1605A. *Simon*, 529 F.3d at 1192. If new section 1605A applied to all claims, including claims that were brought under section 1605(a)(7), there "would be no need to specify that 'the amendments . . . apply to any claim arising under section 1605A." *Id.*

The use of the word "claim" in subsection (c) is also significant. As other provisions in section 1083 make clear, an action already pending under section 1605(a)(7) may end up consisting of the claims brought in the original action and claims brought in a "related action" under section 1605A. Under section 1083(c)(1), claims brought in such a related action "arise under" section 1605A and are therefore subject to the

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[3] The United States as *amicus curiae* has taken the position that the enactment of section 1083 did not abolish the courts' jurisdiction over pending cases under section 1605(a)(7). *See* United States Am. Br. at Point II.

amendments made by section 1083. Thus, the fact that the amendments made by section 1083 apply to a "claim" (rather than to an action or a case) confirms that section 1605A was not intended to apply and does not apply automatically across the board to actions pending under section 1605(a)(7).

The statute's provisions for "related actions," which are also part of subsection (c), clearly contemplate the continued prosecution of a pending action under section 1605(a)(7). Under section 1083(c)'s provisions for pending cases, the plaintiffs in an action already pending under section 1605(a)(7) may either (i) in certain circumstances refile the action under section 1605A, *see* § 1083(c)(2)(A), or (ii) file a "related action" under section 1605A, *see* § 1083(c)(3). The first option, refiling, exists for cases in which a plaintiff brought an action under section 1605(a)(7), relied upon section 1605(a)(7) as creating a cause of action, and has been adversely affected on the grounds that section 1605(a)(7) fails to create a cause of action against the foreign state so sued. *See* § 1083(c)(2)(i)–(iv).

The second option, filing a related action, exists when "an action arising out of an act or incident has been timely commenced under section 1605(a)(7)." § 1083(c)(3). In such a case, the plaintiff is permitted to file any "other" action arising out of "the same act or incident" under section 1605A. *Id.* A related action must be commenced not later than the latter of 60 days after the date of the entry of judgment in the original action, or the date of the enactment of the NDAA. *Id.* In short, the statute clearly provides for the possibility that an action "has been" commenced under section 1605(a)(7) – and the present perfect tense indicates that the action continues to be filed and remains pending – and that another additional action may be filed under 1605A to assert additional claims arising under

that section. *See id.*; *see also* § 1065A(a)(2)(A)(i)(I)–(II) (providing that a claim shall be heard "under this section" *inter alia* if the claim is "filed under this section," if the action is "refiled under this section by reason of section 1083(c)(2)(A)" or "is filed under this section by reason of section 1083(c)(3)" and the various conditions of section 1065A(a)(2)(ii) are met).

There is no suggestion or indication anywhere in section 1605A or section 1083 that in cases in which a related action is brought under section 1605A that the original action under section 1605(a)(7) is mooted or no longer exists or that jurisdiction is withdrawn for such an action. Rather, it is clear from the structure and language of section 1083 that the provisions in sections 1083 and 1605A as to related actions are designed to permit plaintiffs in already pending actions that are viable under section 1605(a)(7) to file additional claims under section 1605A without jeopardizing the court's jurisdiction over their original claims.

In short, section 1083's careful and detailed provisions for pending actions and its distinction between pending actions which may be refiled and pending actions in which related actions may be filed provide confirmation that section 1083 does not remove the court's jurisdiction over actions pending under section 1605(a)(7).

Nor is there any suggestion or indication that the authority granted to the President in section 1083(d) to "waive any provision of this section with respect to Iraq" applies to actions brought under section 1605(a)(7). Indeed, the President's waiver authority expressly and specifically applies only to provisions of "this section," *i.e.*, section 1083 (and therefore to section 1605A which is contained within section 1083). That waiver authority does not apply to section 1605(a)(7).

Moreover, section 1083(c)(4) makes clear that the authority granted to the President in section 1503 of EWSAA did not and does not apply to any provision of the FSIA, including section 1605(a)(7). Section 1083(c)(4), which is entitled "PRESERVING THE JURISDICTION OF THE COURTS," states that

> [n]othing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

§ 1083(c)(4).[4]

This clarification would be entirely unnecessary and the whole issue mooted if Petitioner Iraq were correct that the courts' jurisdiction over cases pending under section 1605(a)(7) were withdrawn retroactively. Plaintiffs in pending cases against Iraq would then be subjected to the requirements of new section 1605A and to the waiver of those provisions that the President signed on the same day he signed section 1083 into law. The clarification provided by section 1083(c)(4) as to "PRESERVING THE JURISDICTION OF THE COURTS" is meaningful only under the assumption that section 1083 contemplates continuing jurisdiction under section 1605(a)(7). Under that assumption, the clarification provided is necessary to confirm the

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[4] Thus, as noted in Point I *supra*, section 1083 confirms the correctness of the ruling by the court of appeals that section 1503 of EWSAA did not authorize the President to remove the jurisdiction of the Courts over claims against Iraq by making section 1605(a)(7) inapplicable with respect to actions brought against Iraq.

correctness of decision by the court of appeals in *Acree* as to the meaning of section 1503 of the EWSAA and to forestall the possible overturning of that decision by this Court, contrary to the intent of Congress. As such, section 1083(c)(4) strongly supports the courts' continuing jurisdiction over pending claims brought under section 1605(a)(7).

In sum, as the court of appeals held, the enactment of section 1605A did not remove jurisdiction in cases pending under section 1605(a)(7). Rather, the provisions in section 1083 and section 1605A for pending cases, taken together and in the context of the statute as a whole, make clear that cases pending under section 1605(a)(7) remain subject to that section unless they are refiled under section 1605A. Moreover, if a related action is filed asserting additional claims arising under section 1605A, those additional claims are governed by section 1605A and the provisions of section 1083, but the original action remains under the jurisdiction of the court pursuant to section 1605(a)(7).

Finally, retroactive application of section 1605A and section 1083 would impermissibly impair antecedent rights of the plaintiffs-respondents. In *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244 (1994), this Court emphasized that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* at 265. *Landgraf* does not discuss or refer to the FSIA. It does note, however, that "[c]hanges in procedural rules may *often* be applied in suits arising before their enactment without raising concerns about retroactivity," *id.* at 274 (emphasis added), and that jurisdictional statutes normally "'speak to the power of the court rather than to rights or obligations of the parties,'" *id.* at 275 (citation omitted). But, as the Court explained, the reason

that changes in jurisdictional rules "usually" apply retroactively is because such a change "usually" does not affect the antecedent rights of the parties. *Id.* at 274-75.

A jurisdictional statute may have substantive effects that preclude retroactive application when it "speaks not just to the power of a *particular* court" to hear the suit, but affects "whether [the suit] may be brought at all." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997). "Such a statute, even though phrased in 'jurisdictional' terms, is as much subject to our presumption against retroactivity as any other." *Id.*

In the present cases, retroactive application of section 1065A or section 1083 (and for that matter section 1503 of the EWSAA) unquestionably affects whether these suits may be brought at all. Indeed, in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 496-97 (1983), this Court expressly distinguished the FSIA from jurisdictional statutes that "do nothing more than grant jurisdiction over a particular class of cases." The Court ruled that the FSIA

> does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state. The Act codifies the standards governing foreign sovereign immunity as an aspect of *substantive federal law* . . . .

Id. (emphasis added). The Court explained that the effect of a court's ruling as to sovereign immunity will determine whether a "plaintiff will be barred from raising his claim in any court in the United States," thus determining whether "'the title or right set up by the party, may be defeated . . . or sustained.'" *Id.* at 497 (citation

omitted). Under *Verlinden* and this Court's retroactivity jurisprudence, neither the amendments to the FSIA nor any statutory provision that would (arguably) grant the President power to alter the application of the FSIA to Iraq in terrorism exception cases should be applied retroactively to strip the courts of jurisdiction over pending cases.

CONCLUSION

The Court should affirm the decisions of the court of appeals holding that section 1503 of EWSAA did not give the President authority to abolish the jurisdiction of the courts over these actions under section 1605(a)(7) and that that jurisdiction over these cases was not withdrawn by the enactment of section 1605A or by the President's exercise of the authority granted him under section 1083(d) of the NDAA.

Respectfully Submitted,

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March 25, 2009

No. 08-539

IN THE

Supreme Court of the United States

REPUBLIC OF IRAQ, *et al.*,

Petitioners,

v.

ROBERT SIMON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF DR. LOUIS FISHER AND DR. ROBERT J. SPITZER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether The Original National Defense Authorization Bill for Fiscal Year 2008 Became a Law On December 30, 2007, Because The President Did Not Veto The Act.

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INTEREST OF AMICI CURIAE[1]

Dr. Louis Fisher is a Constitutional Specialist with the Law Library of Congress. Dr. Robert J. Spitzer is the Department Chair and Distinguished Service Professor, of the Political Science Department at the State University of New York, Cortland. *Amici* have produced substantial scholarly research on the Presidential veto power, and submit this brief to offer the Court whatever assistance they can on the subject of pocket vetoes, and on the so-called "hybrid veto." The views expressed here are personal, not institutional. *Amici* have no other stake in the outcome of this case.

INTRODUCTION

On December 14, 2007, Congress passed H.R. 1585 (110th Cong. (2007)), titled the National Defense Authorization Act for Fiscal Year 2008 (the "original NDAA") by a vote of 370-49 in the House and 90-3 in the Senate. In §1083 of the original NDAA, Congress made it easier to sue foreign terrorist states under §1605 of the Foreign Sovereign Immunities Act ("FSIA") by giving plaintiffs additional procedural rights, and it enacted a new statute of limitations with respect to suits filed under §1605.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

On December 19, 2007, the original NDAA was presented to the President. The first session of the House of Representatives of the 110th Congress was then adjourned, *sine die*[2], in accordance with a concurrent resolution with the Senate which contained a provision for reassembly of the House at the call of the Speaker.[3] The Clerk of the House was designated to receive messages during the adjournment, and remained in communication with the Speaker regarding House business, including action on bills.[4] The Senate remained in *pro forma* session through December 31, 2007, and then adjourned, *sine die*, until January 3, 2008.[5]

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[2] Congress adjourns *sine die*, without a day, at the end of each annual session, including the end of Congress. Section 2 of the Twentieth Amendment to the Constitution provides that Congress shall convene on January 3 of each year unless Congress by statute establishes a different date. U.S. Const. art. I, sec. 5.

[3] *Proceedings of the House of Representatives*, 153 Cong. Rec. H16901, H16940 (daily ed. Dec. 19, 2007). The resolution provided that:

> [t]he Majority Leader of the Senate and the Speaker of the House, or their respective designees, acting jointly after consultation with the Minority Leader of the Senate and the Minority Leader of the House, shall notify Members of the Senate and the House, respectively, to reassemble at such a place and time as they may designate if, in their opinion, the public interest shall warrant it.

S. Con. Res. 61, Sec. 3, 110th Cong. (2007) (enacted).

[4] *Proceedings of the House of Representatives After Sine Die Adjournment of the 110th Congress First Session*, 153 Cong. Rec. 199 (daily ed. Dec. 28, 2007).

[5] *Proceedings of the Senate*, 153 Cong. Rec. 200 (daily ed. Dec. 31, 2007).

On December 28, 2007, the President issued a Memorandum of Disapproval which stated, in pertinent part:

> The adjournment of the Congress has prevented my return of H.R. 1585 within the meaning of Article I, section 7, clause 2 of the Constitution. Accordingly, my withholding of approval from the bill precludes its becoming law. *The Pocket Veto Case*, 279 U.S. 655 (1929).[6]

The President claimed, however, that "[i]n addition to withholding [his] signature and thereby invoking [his] constitutional power to 'pocket veto' bills during an adjournment of the Congress," he was delivering the Memorandum of Disapproval and the bill to the Clerk of the House "to avoid unnecessary litigation about the non-enactment of the bill. . . ."

The Second Session of the 110th Congress reconvened on January 3, 2008. The Congress immediately objected to the President's assertion of a pocket veto, and on January 15, 2008, ordered that the Memorandum of Disapproval be re-characterized as a "veto message."[7] Considerable discussion ensued in

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[6] J.A. AL. The Memorandum of Disapproval begins with the words, "*I am withholding my approval* of H.R. 1585. . ." (emphasis added). This differs from the language traditionally used by the President in a regular veto message, which begins with the words, "*I am returning herewith without my approval* H.R. [ ] . . ." *See* 154 Cong. Rec. 40, H1419 (March 10, 2008) (emphasis added).

[7] 154 Cong. Rec. H5 (daily ed. Jan. 15, 2008); 154 Cong. Rec. S54, S56–7 (daily ed. Jan. 22, 2008).

both Houses of Congress regarding the manner in which the President had attempted to exercise his veto prerogative, and the resultant effect on the status of the bill. For example, Senator Harry Reid, in commenting on the "unfortunate and troubling path" of the legislation, admonished the President for not being "satisfied simply to veto the bill and risk an override," stating:

> The Constitution does not provide for double vetoes: A bill is vetoed either by being returned or, if return is prevented by Congress' adjournment, by being pocketed. . . . The President should abandon the strange and unseemly practice of maintaining that he cannot return a bill to Congress, while simultaneously returning the bill.[8]

In a letter to the President, a bi-partisan Congressional committee stated that:

> The circumstances surrounding the presentment and return of H.R. 1585 and the readiness of Congress to reconsider the bill in light of Presidential objections compel us to question the assertion that a pocket veto did or could have occurred. We think you

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[8] 154 Cong. Rec. S54, S56-7, (daily ed. Jan. 22, 2008) (statement of Sen. Harry Reid); *see also* 154 Cong. Rec. H75, H259 (daily ed. Jan. 16, 2008) (remarks of Rep. Skelton) ("There seems to be a rather interesting intellectual discussion as to the type of veto . . . To me it sounded as if there were two vetoes wrapped up in one message.").

> agree that the pocket veto and the return veto are available on mutually exclusive bases and, therefore, during mutually exclusive periods.[9]

Although some consideration may have been given to attempting an override of the President's "veto" of the original NDAA so as "to establish definitively the Congress' constitutional power to override a veto exercised during its adjournment," ultimately both Houses chose to avoid a constitutional confrontation and the matter was referred to legislative committee.[10] On January 16, 2008, the House passed H.R. 4986 (Pub. L. No. 110-181, 122 Stat. 3 (2008)), a revised version of the original National Defense Authorization Act, which the President then signed on January 28.

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[9] 154 Cong. Rec. E2197-E2198 (daily ed. Oct. 2, 2008).

[10] Senator Reid explained that:

> [M]uch as part of me would like to see Congress take the opportunity provided by the President's action here to establish definitively the Congress's constitutional power to override a veto exercised during its adjournment, the Nation's security and the care of our troops and wounded warriors demands that we get this bill signed into law as soon as possible. . . .

154 Cong. Rec. S57 (daily ed. Jan. 22, 2008) (statement of Sen. Reid); 154 Cong Rec. H10 (daily ed. Jan. 15, 2008).

SUMMARY OF ARGUMENT

1. Under the Presentment Clause, a pocket veto of a bill is possible only when two conditions obtain: (1) when Congress has adjourned, and (2) when return of the bill is prevented. Under *Wright v. United States*, 302 U.S. 583 (1937), an "adjournment" for purposes of the pocket veto occurs only when both Houses of Congress have recessed. In this case, only the House was in recess, and its members were subject to immediate reassembly. Furthermore, a return of the bill to the House of origin was not prevented because a duly designated agent of the House was available to receive the return throughout the 10-day period allowed for the President's consideration of the bill, a practice explicitly permitted under *Wright*.

The "qualified veto" procedure set forth in the Presentment Clause was chosen at the Constitutional Convention during which the framers considered, and expressly rejected, the concept of an absolute veto. The pocket veto is an absolute veto. A qualified veto is subject to override by the Congress and is Constitutionally favored over the pocket veto.

Construction of the Presentment Clause must be guided by practical considerations, so as to ensure preservation of its two fundamental purposes: (1) that the President shall have suitable opportunity to consider the bills presented to him, and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to override them. Brief intersession and intra-session adjournments of Congress, especially in light of modern communications

and travel capabilities, do not operate to prevent a return of a bill by the President, nor its reasonably prompt reconsideration by the Congress.

2. The finely wrought procedures of the Presentment Clause allow for only two types of vetoes: qualified vetoes (returned to Congress for possible override) and pocket vetoes (not returned). In this case, the President issued a Memorandum of Disapproval of the National Defense Authorization Act of 2008, wherein he purported to invoke simultaneously both the pocket veto power and the qualified veto power—a so-called "hybrid veto." Since the founding of our country, presidents have sent written explanations to Congress explaining their reasons behind the exercise of the pocket veto, and constitutional scholars have uniformly agreed that those explanations are constitutionally insignificant and do not constitute a return of a bill. If the President withholds his signature in a situation where return of the bill was not prevented under the *Wright* analysis, then the bill becomes a law on the 10th day, even if the President has explained his reasons for the ostensible pocket veto.

The statutory enactment procedures of the Presentment Clause require the President to either return a bill or withhold his signature. This obligation is the President's alone and cannot be delegated to Congress. The notion of a "hybrid veto" is inherently contradictory and ambiguous, and operates to obfuscate the President's decision, thereby impeding the Congress' constitutional mandate to reconsider vetoed bills. Additionally, the "hybrid veto" imbues the entire legislative process with uncertainty, encourages litigation, and causes delay in an area where efficiency and precision are of utmost importance.

ARGUMENT

THE ORIGINAL NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2008 BECAME A LAW ON DECEMBER 30, 2007 BECAUSE THE PRESIDENT DID NOT VETO THE ACT IN ACCORDANCE WITH THE CONSTITUTION.

I. The President Did Not Effectuate a Pocket Veto of the Original NDAA Because He Was Not Prevented From Returning It to Congress.

The authority for the President's veto power is found in the Presentment Clause of the Constitution. After a bill has passed both Houses of Congress, but "before it become[s] a Law," it must be presented to the President. If he approves it, "he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." U.S. Const. art. I, § 7, cl. 2.[11] The President's "return"

[11] The full text of the relevant paragraph of Section 7 provides:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

of a bill, which is usually described as a "veto," is subject to being overridden by a two-thirds vote in each House, which is why it is sometimes known as a "qualified veto."

The Presentment Clause allows for an absolute veto in only one situation, *i.e.*, when "the Congress by their Adjournment prevent its return" within 10 days, "in which case it [the bill] shall not be a law." The fundamental purpose of what is known as the "pocket veto" provision is to guard against the possibility that Congress could pass a bill but then quickly adjourn as a way of avoiding a veto before the President had a chance to return the bill.[12] In other words, the pocket veto is possible only when two conditions obtain: (1) when Congress has adjourned, and (2) when return is prevented.

Accordingly, the crucial inquiry in this case is whether the House of Representatives' Christmas holiday adjournment was an adjournment of the Congress which prevented the return of the bill, notwithstanding the official and well-known designation of the Clerk of the House to receive veto messages during a brief recess, the readiness of members of Congress to reassemble if summoned by the Speaker, and the fact that the Senate remained in *pro forma* session. The correct answer is that there was no such adjournment; therefore, the attempted pocket veto was invalid.

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[12] Robert J. Spitzer, *The Law: The "Protective Return" Pocket Veto: Presidential Aggrandizement of Constitutional Power*, Presidential Studies Quarterly, 722 (Dec. 2001) (hereinafter "Spitzer, *The 'Protective Return' Pocket Veto"*).

A. The President was not prevented from returning the Original NDAA because the Senate remained in session, he had adequate opportunity to review the bill, an agent of the House was available to receive veto messages, and Congress was available to act with "reasonable promptitude" on the President's objections.

Pocket vetoes reflect the practice of the 19th and early 20th centuries, when Congress would adjourn for significant periods of time between the first and second sessions.[13] After ratification of the Twentieth Amendment on January 23, 1933, short Congressional sessions disappeared, as did lengthy inter-session adjournments. Congress now meets year-round.

The question of when an adjournment of a House of Congress prevents the return of a bill under article 1 section 7, clause 2 has been before the Court on two occasions: *Okanogan Indian Tribe v. United States*, 279 U.S. 655 (1929) (*The Pocket Veto Case)* and *Wright v. United States*, 302 U.S. 583 (1938).

The Pocket Veto Case, involved a lengthy intersession adjournment of Congress. The bill at issue in that case reached President Coolidge less than 10 days before the close of the first session of the 69th Congress. The

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[13] James Madison was the first president to exercise a pocket veto. Both of President Madison's pocket vetoes were done after lengthy adjournment between the first and second sessions of Congress. *See* discussion in Louis Fisher, *The Pocket Veto: Its Current Status*, Congressional Research Service (March 30, 2001) (citations omitted).

intersession adjournment lasted from July 3 until December 6, 1926—over five months. The Court unanimously ruled that the adjournment of Congress at the end of a session prevented the return of the bill by the President to the Congress, because the House from which the bill originated was not sitting in an organized capacity, and the Constitution did not allow for delivery of the President's objections to an officer or agent of either House during the adjournment. *Id* at 684.[14]

Nine years later, this Court ruled in *Wright v. United States* that a 3-day intra-session recess of one house of Congress did not constitute an adjournment which prevented the return of a bill to that legislative body by the President within the meaning of article I, section 7, clause 2. The Court identified the threshold question as whether the Congress had adjourned, and then stated:

> 'The Congress' did not adjourn. The Senate alone was in recess. The Constitution creates and defines 'the Congress.' It consists 'of a Senate and House of Representatives.' Art. 1, section 1. The Senate is not 'the Congress.' . . . . The reference to the Congress is manifestly to the entire legislative body consisting of both Houses. Nowhere in the

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[14] In reaching its conclusion, the Court pointed out that the formal rules of the Senate did not allow for appointment of agents for purposes of receipt of presidential communications. *Id.* Accordingly, the Court was not striking down a formally established congressional practice.

> Constitution are the words 'the Congress' used to describe a single House.

Wright v. United States, 302 U.S. 587–588 (1938). Furthermore, and notwithstanding the fact that the Senate—the chamber in which the bill originated—was in recess, the Court determined that there was no "practical difficulty" in making a return of the bill because the organization of the Senate continued, "an accredited agent of the legislative body" (*i.e.*, the Secretary of the Senate) was available to receive the bill, and the Senate would be able to act with "reasonable promptitude" upon the President's objections. *Id.* at 590.

The *Wright* Court also limited the opinion and dictum of *The Pocket Veto Case*, explaining that the dangers that the Court had envisaged in that case—*i.e.*, keeping of the bill in an indefinite state of suspended animation with no certain knowledge on the part of the public whether it was seasonably delivered—"appear to be illusory when there is a mere temporary recess" after which the Congress would be able to act with "reasonable promptitude" upon the President's objections. *Id.* at 590, 594.[15] The Court explicitly contradicted the idea in *The Pocket Veto Case* that Congress could not designate agents to receive vetoed bills or for other purposes, and cautioned that the earlier case should not be construed so broadly so as to "frustrate the fundamental purposes of the constitutional provision as to action upon bills." *Id.*

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[15] However, there is no specific time period within which Congress must act upon those objections. If Congress chooses to do nothing, the President's veto prevails.

The Court emphasized that construction of the Presentment Clause must be guided by practical considerations, so as to ensure preservation of its two fundamental purposes: (1) that the President shall have suitable opportunity to consider the bills presented to him, *and* (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to override them. *Wright v. United States*, 302 U.S. at 596 (citation omitted). To that end:

> [t]here is no greater difficult[y] in returning a bill to one of the two Houses when it is in recess during the session of Congress than in presenting a bill to the President by sending it to the White House in his temporary absence. . . . To say that the President cannot return a bill when the House in which it originated is in recess during the session of Congress, and thus afford an opportunity for the passing of the bill over the President's objections, is to ignore the plainest practical considerations and by implying a requirement of an artificial formality to erect a barrier to the exercise of a constitutional right.[16]

302 U.S. at 590.

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[16] The *Wright* Court's new emphasis on practical considerations referred explicitly to the reasoning in the *amicus* brief of Congressman Hatton Sumners, who had unsuccessfully made the same argument on behalf of the Petitioners in *The Pocket Veto Case*. *Wright v. United States*, 302 U.S. at 593; *see* Brief of Hatton W. Sumners, Representative of the Committee on the Judiciary of the House of Representatives as *Amicus Curiae* Supporting Petitioners, in *The Pocket Veto Case* (hereinafter "Sumners Brief").

Lower courts applying the "practical considerations" standard of *Wright* to the modern Houses of Congress have consistently determined that brief intra-session and intersession adjournments do not operate to prevent a return of a bill by the President. One such case was *Kennedy v. Sampson*, 511 F.2d 430, 437 (D.C. Cir. 1974) which stemmed from a Memorandum of Disapproval issued on December 24, 1970, by President Richard Nixon in which he claimed to exercise a pocket veto over the Family Practice of Medicine Bill during an intra-session adjournment of Congress. The bill had passed both houses of Congress with overwhelming majorities, providing what appeared to be ample votes to override any veto that the President might exercise. Both chambers of Congress adjourned on December 22 for the Christmas holidays.[17] The Senate, in which the bill originated, returned on December 28 and the House on the next day, several days after the final day for the President to act. A district court held that whereas the Christmas adjournment was short and temporary, and the Senate Secretary was designated to receive any messages from the President during that time, the adjournment had not prevented President Nixon from returning the bill to the Senate, and "therefore that the pocket veto was invalid and S. 3418 became a law without the signature of the President. . . ."[18] The decision was

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[17] By contrast, in the case now before the Court, the Senate was in *pro forma* session when the President claimed to have issued a pocket veto.

[18] *Kennedy v. Sampson*, 364 F. Supp. 1075, 1086–87 (D.D.C. 1973).

upheld by the D.C. Court of Appeals, and the Justice Department did not appeal to the Supreme Court. *Kennedy v. Sampson*, 511 F.2d 430, 432 (D.C. Cir. 1974).[19]

Similarly, in 1985, the D.C Court of Appeals in *Barnes v. Kline* struck down the pocket veto when used during a brief, intersession adjournment where the Houses of Congress had made arrangements for the receipt of veto messages. *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *vacated and remanded to dismiss sub nom. Burke v. Barnes*, 479 U.S. 361 (1987).[20]

Year-round sessions of Congress, improved means of transportation and instant communication, and the well-accepted use of legally designated agents all lead to the conclusion that the only adjournment which will prevent a return of a bill is the final adjournment of Congress itself, and not an adjournment of one of its sessions. In point of fact, Presidents Ford, Carter, and Reagan returned many bills during intersession and intra-session adjournments of more than 3 days duration—all in the period before the availability of

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[19] Senator Kennedy also challenged President Nixon's pocket veto of an urban mass transit bill, rendered between the first and second sessions of the 93rd Congress on December 22, 1973. *Kennedy v. Jones*, 412 F. Supp. 353 (D.D.C. 1976). But on April 13, 1976, the Ford administration consented to the entry of judgment in favor of Kennedy.

[20] The Reagan administration appealed, and in January 1987 this Court reversed the court of appeals and dismissed the suit as moot because since the law in question applied only to 1984, even had it been signed it would have by then expired.

cellular phones, instant messaging, and *Skype*.[21] In this case, the bill reached President Bush two weeks before the close of the First Session of Congress, and the Senate—and therefore, 'the Congress'—remained in session. That the President had "suitable opportunity to consider" the bill was apparent from the fact that he issued the Memorandum of Disapproval two days prior to the expiration of the 10-day period allowed by the Presentment Clause. *Wright v. United States*, 302 U.S. at 596.[22] The Clerk of the House was able to receive (and did receive) the President's objections, and the brief and temporary recess of the House—subject as it was to immediate reassembly—would have allowed Congress to act with "reasonable promptitude" on those objections. *Id.* at 590.

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[21] *See generally The Law Surrounding the President's Use of the Pocket Veto Hearing on H.R. 849 Before the Subcomm. On the Legislative Process of the House Committee on Rules*, 101st Cong. 1-54 (1989) (hereinafter "*Hearing on H.R. 849*"). Even if the Congress, due to a cataclysmic event, was temporarily unable to meet year-round, liberal use of the pocket veto would not be appropriate, as long as a duly designated congressional agent remains available to receive messages from the President and transmit them to congressional leaders. Under *Wright*, the inquiry remains a practical one.

[22] Certainly the use of [a Memorandum of Disapproval] is inconsistent with the theory that the President has not been afforded an opportunity to consider the bill. If the memorandum is transmitted to Congress during the same session . . . , there is no logical reason why the bill should not be eligible for reconsideration in the light of the President's reasons for withholding his approval.

Charles J. Zinn, *The Veto Power of the President*, 12 F.R.D. 207, 238 (1951).

B. Extension of the "pocket veto" exception to circumstances where the fundamental purposes of the Presentment Clause have been met would result in an aggrandizement of presidential power that is contrary to the language of the Constitution and the Framers' abhorrence of an absolute veto.

As discussed *supra*, the sole purpose of the "pocket veto" provisions of the Presentment Clause was to prevent a situation where the Congress presents the President with an objectionable bill less than 10 days before the expiration of the session, thereby obviating return of the bill. Absent the "pocket veto," if a bill the President does not wish to sign cannot be returned to Congress, it becomes a law after ten days. Thus, the language of the Presentment Clause clearly indicates that the pocket veto power was created as an exception to the general rule that Congress must have the opportunity to override presidential disapproval of proposed legislation.[23] Whereas rejection of an absolute presidential veto is explicit in both the proceedings of the Constitutional Convention and in contemporaneous commentary,[24] the pocket veto may

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[23] Congressional reconsideration of vetoed bills is a constitutional mandate. *See* discussion in Part II.B.(1), *infra*.

[24] *Sampson*, 511 F.2d at 437 (citing 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 104, 106 (ed. 1937)) (hereinafter cited as M. Farrand); 2 M. Farrand at 71, 200, 301, 582, 585 (the last page recording the opinion of one delegate that even a provision requiring a three-fourths vote to override "puts too much in the power of the President."). *See* J. Richard Broughton, *Rethinking the Presidential Veto*, 42 Harv. J. on Legis. 91, 103 (2005) (citations omitted).

fairly be described more as a limitation on presidential power.[25]

In this case there was adequate opportunity to carry out the constitutionally required statutory enactment procedures that clearly would have allowed Congress to fulfill its constitutional mandate to reconsider the bill and whether (or not) to attempt an override. The President was fully capable of delivering a veto message, and the House was fully capable of receiving one.

However, rather than seeking to comply with the language of the Presentment Clause and the intent of the Founding Fathers, the President has challenged the return obligation at the precise point at which, if followed one step further, it would rid him of jurisdiction over the bill and place it in the custody of the House of its origin so that the legislative plan fixed by the Constitution could be fully consummated.[26]

The "qualified veto" procedure was chosen at the Constitutional Convention during which the Framers considered, and expressly rejected, the concept of an absolute veto.[27] The seduction of the pocket veto is that

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[25] Broughton, *supra*, at 103 ("[T]he Convention's provision for a well-defined separation of powers, [and] its disdain for the accessories of kingly authority . . . suggested that the constitutional structure of the new government would be best served by a prudent and cautious view of the presidential veto.").

[26] Sumners Brief, *supra* note 16, at 28.

[27] *See* 2 M. Farrand, *supra* note 24, at 299–301. Alexander Hamilton wrote in the *Federalist*: "The king of Great Britain, (Cont'd)

it avoids an override fight and therefore guarantees short-term success for the President as well as making his lot a little less complicated, but the structure of the Constitution, and particularly the legislative process, does not hold ease and efficiency as its principal values. *INS v. Chadha*, 462 U.S. 919, 944 (1983).[28] A broad interpretation of which types of adjournments will operate to prevent the return of a bill would provide the President with precisely the expansive absolute veto powers which the framers rejected in Philadelphia. "Where choice may be had between two constructions, that construction is to be adopted which is most in harmony with the whole instrument of which the provision under construction is a part."[29]

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on his part, has an absolute negative upon the acts of the two houses of Parliament. . . . The qualified negative of the President differs widely from this absolute negative of the British sovereign. . . .". *The Federalist*, No. 69 at 464 (Alexander Hamilton). The abuse of the veto power by the king had seriously disturbed the colonists, who complained: "'He has refused his Assent to Laws, the most wholesome and necessary for the public good.'" Zinn, 12 F.R.D. at 212 (quoting *Declaration of Independence*).

[28] *See also Hearing on H.R. 849*, 101st Cong. 7 (statement of Robert J. Spitzer, Chairman, Chairman, Dept. of Political Science, State University College, Cortland, NY).

[29] Sumners Brief, *supra* note 16, at 79.

II. A Memorandum of Disapproval Which Is Delivered to the Congress Under Claim of Both a Pocket Veto and a Qualified Veto Is Not a Veto of a Bill Within the Meaning of the Presentment Clause of the Constitution.

A. A presidential veto must comply with the finely wrought procedures of the Presentment Clause.

The statutory enactment procedures of the Presentment Clause allows for two types of vetoes: regular vetoes (returned to Congress for an override vote) and pocket vetoes (not returned). The statutory enactment procedures of the Presentment Clause:

> were the product of the great debates and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that *the power to enact statutes may only 'be exercised in accord with a single, finely wrought and exhaustively considered, procedure.'*

Clinton v. City of New York, 524 U.S. 417, 440 (1998) (quoting *INS v. Chadha*, 462 U.S. at 951).

(1) The Presentment Clause does not provide for a "hybrid veto" procedure.

The President in this case attempted to use a "hybrid veto"—a situation where the President claims the absolute power of pocket veto but, at the same time, indicates in the Memorandum of Disapproval that the bill is being returned, thereby subjecting it to a possible

override.[30] Not only is the "hybrid veto" not a product of the finely wrought procedures of the Presentment Clause but, by constitutional design and definition, the regular veto and the pocket are mutually exclusive and different acts.[31]

Beginning with the administration of George Washington, our nation's Presidents have understood the text of the Presentment Clause as requiring that he either "approve all the parts of a Bill, or reject it in toto."[32] Indeed, the recent and dubious validity of the President's attempt to claim simultaneously the power of the qualified veto and the absolute veto is apparent from the congressional testimony of William Rehnquist, then head of the Office of Legal Counsel in the Nixon administration, who stated:

> [i]t is a question of constitutional meaning, whether in a particular situation Congress has prevented the return of the bill by its adjournment. Now the President may be wrong in doing what he does; *but I do not think that, as I read the Constitution, it contemplates giving him an option* saying you either pocket veto in a situation or you can send it back with a veto message. . . . *[T]he President, based on*

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[30] Louis Fisher, *The Pocket Veto: Its Current Status*, Congressional Research Service, CRS-6 (March 30, 2001). The procedure has also been described as a "dual veto" and a "protective return" veto. *Ibid.*; Spitzer, *The "Protective Return" Pocket Veto*, at 728.

[31] Spitzer, *The "Protective Return" Pocket Veto*, at 729.

[32] *Clinton*, 524 U.S. at 440 (quoting 33 *Writings of George Washington* 96 (J. Fitzpatrick ed., 1940)).

whatever advice he can get, has to determine, 'Is this a pocket veto situation or is it a regular veto situation?' and it is either one or the other. . . .[33]

(2) A "hybrid veto" is not a "return" of a bill.

Although the Constitution does not define what shall constitute a "return" of a bill, the Framers clearly understood that plainly stated term—and the means by which it would be effectuated—to be associated exclusively with the qualified veto.[34] When the President returns a bill within the meaning of the Presentment Clause, the established practice is to send a message to the appropriate House that begins with the words, "*I am returning herewith without my approval . . .*"[35] "Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character." *The Pocket Veto Case*, 279 U.S. at 689.

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[33] *Constitutionality of the President's "Pocket Veto" Power: Hearing Before the S. Subcommittee on Separation of Powers of the Committee on the Judiciary* (daily ed. Jan. 26, 1971) (statement of William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel) (emphasis added) (hereinafter, *Hearing: S. Committee on the Judiciary*); *Constitutionality of the President's "Pocket Veto" Power* (pp. 14–15); *see also* note 26, *infra*.

[34] *See The Federalist No. 73* (Alexander Hamilton) ("The first thing that offers itself to our observation, is the qualified negative of the President upon the acts or resolutions of the two houses of the Legislature; *or in other words, his power of returning all bills with objections. . . .*") (emphasis added).

[35] *See supra* note 5. This differs from the opening sentence of the Memorandum of Disapproval, which begins with the words, "I am *withholding* my approval. . . ." *Id.*

The use of the Memorandum of Disapproval as a device to effectuate both a pocket veto and "return" of a bill is a recent executive maneuver that is inconsistent with long-established legislative practice and not a proper return. The practice of issuing explanatory messages dates to the earliest pocket vetoes but faded after the Civil War. President Franklin D. Roosevelt revived the practice and made it an official policy of his administration to attach a formal memorandum of disapproval to a bill which was being "pocket vetoed."[36]

In the decades which followed, the practice—and its universally acknowledged constitutional insignificance[37]—continued. As William Rehnquist stated to the House Judiciary Committee:

> [W]here Congress by their adjournment has prevented the return of the bill, then [the President's] failure to sign it means it is not a

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[36] *See generally* Clement E. Vose, *The Memorandum Pocket Veto*, The Journal of Politics, Vol. 26, No. 2 (May 1964), pp. 397-405; Samuel B. Hoff, *The Presidential Pocket Veto: Its Use and Legality*, Journal of Policy History, Vol. 6, No. 2 (1994), p. 194 (citing Louis Fisher, *Constitutional Conflicts Between Congress and the President*, 2007, 5th edition); and Spitzer, *The Presidential Veto*.

[37] *See, e.g.*, Claudius O. Johnson, *American National Government* 512 (5th ed. 1960). ("Presidents have commonly stated their objections to bills they have pocket-vetoed, *but such statements are not official veto messages nor do they detract from the fact that the pocket veto is an absolute one, that may not be overridden by Congress.*"); *Hearing, S. Committee on the Judiciary, supra* note 24 (statement of William Rehnquist).

> law; *whether he accompanies it with a message or not does not make any difference. If, in fact, if it is a regular veto situation, then if he has not sent it back with a veto message, it becomes a law.*[38]

Congress has resisted presidential attempts to vest the Memorandum of Disapproval with the dual character of a pocket veto explanation and a veto message,[39] and has mounted successful legal challenges to the practice.[40] However, even if Congress were to appear to tolerate—either by affirmation or by acquiescence—the so-called "protective return," the practice would remain constitutionally defective. *Clinton v. New York*, *supra* at 436–49.[41] The provisions of Article I are integral

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[38] (emphasis added). *Hearing, S. Committee on the Judiciary*, *supra* note 24 (statement of William Rehnquist).

[39] The Congress has dispatched letters to, *inter alia*, Presidents George H.W. Bush, William J. Clinton, and George W. Bush objecting to use of the hybrid veto. *See., e.g.*, 146 Cong. Rec. H11853 (Nov. 13, 2000) and 154 Cong. Rec. E2197 (Apr. 14, 2008).

[40] *Kennedy v. Sampson*, 511 F.2d 430; *Barnes v. Kline*, 759 F. 2d 21.

[41] A claim of power is frequently permitted or yielded to merely because it is claimed, and it may be exercised for a long period in absence of any constitutional right or power, or even in violation of constitutional prohibition without special occasion arising for its interpretation by a court, or anyone being sufficiently interested in the subject to raise the question, but these circumstances cannot be allowed to sanction a clear infraction of the Constitution, or the neglect

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requirements of the constitutional design for the separation of powers, not abstract generalizations in the minds of the Framers of Constitution that may be altered at will by the President. *INS v. Chadha*, 462 U.S. at 945–946. That the "hybrid veto" should now be accepted as a legitimate effectuation of the Presentment Clause's mandate of "return" would be tantamount to allowing the President to achieve, by imposition of this new practice, that which must come only through the amendment procedures set forth in Article V of the Constitution. *Clinton*, 524 U.S. at 449.

B. The uncertainty created by a hybrid veto impedes the constitutional mandate of congressional reconsideration of vetoed bills, and undermines the integrity of the legislative process.

(1) Congressional reconsideration of vetoed bills is a constitutional mandate that can be triggered only by the President's deliberate and non-delegable presidential exercise of the "qualified veto."

The Presentment Clause provides that upon receiving the President's veto message the House in which the bill originated:

> *shall* proceed to reconsider it. If after such Reconsideration two thirds of that House shall

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> to discharge constitutional duties or the disregard of the clear right of the Congress.

Sumners Brief, *supra* note 16, at 51 (quoting *Cooley's Constitutional Law* at 85).

> agree to pass the Bill, it *shall* be sent, together with the Objections, to the other House, by which it *shall* likewise be reconsidered, and if approved by two thirds of that House it *shall* become a law.

U.S. Const. art. 1, § 7.[42] As this Court stated in *Wright*,

> Where the President does not approve a bill, the plan of the Constitution is to give the Congress the opportunity to consider his objections and to pass the bill despite his disapproval. It is for this purpose that the time limit for return is fixed. *This opportunity is as important as that of the President.*

Wright v. United States, 302 U.S. at 596 (emphasis added). The constitutional requirement that Congress reconsider vetoed legislation reflects the Framers' belief that

> the oftener a measure is brought under consideration, the greater the diversity in the

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[42] It is not insignificant that the Framers chose the word "shall" in connection with the exercise of this congressional prerogative, for

> [i]n expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. . . . Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.

Wright, 302 U.S. at 588 (internal quotation marks and citations omitted).

> situations of those who are to examine it, the less must be the danger of those errors which flow from want of due consideration . . . .

The Federalist No. 72 (Alexander Hamilton).[43]

The clear purpose of the Congress' obligation to reconsider a returned bill is to decide whether the bill will be put to a possible override vote. By definition, this obligation arises if—and only if—the President has vetoed the bill by returning it to Congress with his objections.

However, the inherently contradictory "hybrid veto" operates to obfuscate the President's actions, leaving in doubt the application of the "return" and "reconsideration" provisions of the Presentment Clause—"the certainty of whose application is of extreme importance." *Wright v. United States*, 302 U.S. at 599 (Stone, J., dissenting). Any construction of the Presentment Clause which might operate to frustrate

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[43] James Madison wrote of the importance of legislative reciprocity in his letter to Henry Clay, wherein he stated:

> [i]t is obvious that the Constitution meant to allow the President an adequate time to consider the Bills &c presented to him, and to make his objections to them; and on the other hand that Cong. should have time to consider and overrule the objections. *A disregard on either side of what it owes to the other, must be an abuse, for which it would be responsible under the forms of the Constitution.* . . .

9 G. Hunt, *Writings of James Madison* 515 (1910) (emphasis added).

Congress' opportunity to reconsider and override a vetoed bill is impermissible. *Id.* at 596 (citations omitted).

The fact that in this case Congress chose not to confront the President does not fix the constitutional problem.[44] The obligation to return or not a bill to Congress belongs to the President, and is not delegable to Congress. *INS v. Chadha*, 462 U.S. at 919. "Acquiescence or sufferance for no length of time can legalize a clear usurpation of power or a power exercised under a mistaken conception."[45]

In this case, therefore, the original NDAA, being neither signed by the President nor properly "returned" by him to the House of its origin, was neither vetoed by the President nor "reconsidered" by the Congress.

(2) The "hybrid veto" imbues the legislative process with an uncertainty that encourages delay, public distrust, and litigation.

The use of the hybrid veto introduces confusion into a field where definiteness and precision are of paramount importance. *Wright v. United States*, 302 U.S. at 604 (Stone, J., dissenting). In this very case, for example, Congress characterized the President's memorandum first as "double vetoes," then declared that the memorandum constituted a veto message, and

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[44] *See* 154 Cong. Rec. S57 (statement of Sen. Reid), *supra* note 8.

[45] Sumners Brief at 51.

ultimately behaved as if the measure had been pocket vetoed.[46] Instead of fulfilling presidential predictions that the dual veto procedure will "leave no doubt" that a bill was vetoed, the result is protracted uncertainty and disagreement with respect to the history and status of legislation[47] passed by Congress but disapproved by the President.

Such uncertainty places the delicate balance of legislative powers at risk. As an institution, Congress' responses to the duality of the "hybrid veto" have been inconsistent and ambiguous.[48] Absent judicial intervention, there is no way to say definitively whether

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[46] *See* 154 Cong. Rec. S54, S55-6, (daily ed. Jan. 22, 2008) (statement of Sen. Reid) and discussion at note 4, *supra*.

[47] For example, if the President exercises a "dual veto" and Congress does not attempt or does not succeed in an override, "either way the bill is dead, but the legal ambiguity of how it was killed remains." Spitzer, *supra*, at 730; 136 Cong. Rec. S349 (daily ed. Jan. 25, 1990) (statement of Sen. Kennedy) ("It is not clear now whether [the President] is relying on the pocket veto. And in questioning the counsel for the administration, they have some differences on that; they take issue about whether we are dealing with a pocket veto or a real veto. But if it should be a pocket veto, then it would not have to be respected. You would have a difference in the legal situation as well.").

[48] On some occasions members of Congress have treated the "protective return" as a pocket veto; on other occasions it has been treated as a veto message." *Compare* 136 Cong. Rec. S349 (daily ed. Jan. 25, 1990) (statement of Sen. Sarbanes) (Memorandum of Disapproval treated as a pocket veto) *with* Congressional Record – Senate, 136 Cong. Rec. S348 (daily ed. Jan. 25, 1990) (Memorandum of Disapproval is "mere correspondence.").

Congress' treatment of the President's exercise of a pocket veto in any given situation was proper. If characterization of the President's ostensible exercise of the pocket veto is left to congressional whim, then even the appropriate exercise of that power by the President is in peril.

Furthermore, the consequences of legislation produced in such an ambiguous manner include the inhibition of "public, certain, and prompt knowledge as to the status of the bill . . . ." *The Pocket Veto Case*, 279 U.S. at 685. The public cannot promptly and properly discern whether the "protective return" is an actual return that is subject to congressional override, or a fictitious return—*i.e.*, a pocket veto that is not subject to override—when its own government disagrees as to the bill's fate. *Id.*[49] These are precisely the dangers that the Presentment Clause is designed to avoid.

There are policy reasons to avoid hybrid vetoes as well. Public uncertainty encourages litigation to resolve the disagreement over the status of the legislation. For example, where the President exercises a hybrid veto, but Congress succeeds in override votes, potential litigants who are harmed either by the bill's enactment (successful override) or by its defeat (through pocket veto) may file suit. Additional litigation is likely if the President orders that the bill not be published as a law.[50]

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[49] 137 Cong. Rec., S1890, S1894 (daily ed. Feb. 19, 1991) ("The President's actions on H.R. 2712 and the Congress' response are but the latest in a string of thrusts and parries. The President believes he exercised a 'pocket veto' and the bill is dead. The House has treated H.R. 2712 and its papers as though the President exercised a traditional 'return veto'.").

[50] *Id.*

Requiring Congress to re-pass an ostensibly pocketed bill is not an appropriate solution to these constitutional problems. Such a routine is, at best, unnecessarily repetitive and time-consuming. As explained by one senior Senator, the passage of bills requires subcommittee and full committee action as well as proceedings on the floors of both the Senate and the House—expenditures of time and personnel that are funded by limited public coffers.[51] At worst, if the unique alchemy of public and private interests that enabled the legislative process to function successfully the previous time around had disappeared, the result may be that the bill cannot be passed again. It is, therefore,

> against all reason and every recognized rule of construction, when the avoidance of unnecessary delay is so clearly manifest in the provision sought to be construed, that a construction should be superimposed which would make for delay . . . .

Wright v. United States, 302 U.S. at 591 (internal quotation mark and citation omitted).

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[51] Edward M. Kennedy, *Congress, the President, and the Pocket Veto*, 63 Va. L. Rev. 355, 381 (1977).

CONCLUSION

In litigation on the pocket veto, this Court has made clear that it operates to prevent Congress from gaining the upper hand in the legislative process by passing legislation and then adjourning prior to the expiration of the 10 days provided for the executive's consideration under the Constitution. *See supra* Part I.B. Because the pocket veto operates as an absolute veto this Court has made equally clear that a pocket veto is to be strictly construed, and where the conditions precedent for a pocket veto do not exist then the attempt is a nullity and by operation of the Presentment Clause the legislation becomes law. *See supra* Part I.A. In the case of H.R. 1585, Congress was in session. Accordingly, the President's attempt at a pocket veto is a nullity, and by operation of the Presentment Clause, H.R. 1585 became law.

It is tempting to conclude that the President acted simply in an overabundance of caution and give effect to his intent to veto the legislation by pocket or otherwise. That conclusion, however, is belied by the fact that if the President was unsure of whether Congress was truly out of session he could have simply attempted to return the bill to Congress with his veto. If Congress was truly out of session then pursuant to the Presentment Clause his attempted but failed return would have acted as a pocket veto. If instead Congress was in session, then his return would have effectively vetoed the resolution, allowing Congress to either attempt to override or abandon the legislation as written.

Rather than vetoing the legislation and then returning it to Congress, what the President did was to attempt to stack the deck in his favor by alternatively citing his powers to pocket veto the bill and to veto the bill, thereby leaving Congress with the Hobson's Choice of either treating the bill as a veto that it could override, or as a pocket veto that it could not. As demonstrated by the reaction of individual Senators and Congressmen, the President's use of alternative authorities for his veto unquestionably gave Congress pause. *See supra* notes 7-9 and accompanying text. What is known is that the congressional leadership ultimately chose to treat the President's actions as a regular veto, but chose not to attempt an override. What is unknown is to what extent the uncertainty created by the President's actions influenced that choice. Congress had to be aware that in the event that they succeeded in overriding the President's veto the legislation would face an uncertain future in both the executive branch's willingness to expend the funds contained within the legislation and in the courts, should opponents of the legislation seek to challenge its viability. This uncertainty, coupled with the urgent need for the funding contained within the legislation ultimately dictated Congress' choices. Congress did not attempt an override, and instead passed a revised bill, absent the provision including the amenability of the Republic of Iraq to suit in federal courts, to which the President objected, and the President signed the legislation.

In short, by claiming both the pocket veto, and hedging this by claiming in the alternative that the memorandum operated as a veto, the President got what the President wanted. Giving effect to this hybrid form of veto, however, tips the balance of power towards the President, and as this court held in *Wright*, *Chadha*, and

Clinton v. New York, strict adherence to the Presentment Clause is necessary to preserve the balance created by the founders. If the President attempts to invoke the power of the pocket veto, in whole or in part, without the precedent requirements, as was the case with H.R. 1585, then the legislation must become law, as the former head of the Office of Legal Counsel, William Rehnquist, pointed out.

The power of the pocket veto is extraordinary, and to prevent it from having unintended consequences in tipping the balance, the risk must fall to the President to correctly determine whether the conditions precedent exist. If the President is permitted to hedge this determination, then the President can use the extraordinary power of the pocket veto without risk, and will undoubtedly continue to do so in situations where it is not appropriate, as was the case here.

For the foregoing reasons, this Court should affirm the *Simon* court's judgment.

Respectfully submitted,

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March 25, 2009

No. 08-539

IN THE

Supreme Court of the United States

REPUBLIC OF IRAQ, *ET AL.*,

Petitioners,

v.

ROBERT SIMON, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE OF THE HUMAN RIGHTS COMMITTEE OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION SUPPORTING AFFIRMANCE

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INTEREST OF AMICUS CURIAE

Amicus Curiae, the Human Rights Committee of the American Branch of the International Law Association, is composed of lawyers and professors of law who have practiced and/or lectured and/or published widely on these and related matters.[1]

Members of *Amicus* are strongly committed to the rule of law. They believe that it is important for the United States to adhere to the rule of law both domestically and with respect to its international legal obligations. No nation can be a leader internationally unless it honors its treaty obligations. In its traditional commitment to the rule of law, the United States has a proud tradition of leadership in seeking to end torture, and particularly in working to protect prisoners of war from torture. It would be a clear and serious violation of treaty obligations of the United States to absolve Iraq of its liability for its brutal torture of American prisoners of war and civilians counter to the mandatory language in Article 131 of the Geneva Convention Relative to the Treatment of Prisoner of War of 12 August 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316, and in Article 148 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516, among other treaties.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, their members, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

The significant and historic case of *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), concerned with the protection of American POWs from torture by the enemy, is still before the courts and the decision of this Court will be of critical importance in protecting these and future American POWs held by enemies of the U.S. In that connection, members of *amicus* are experts in international law and the foreign relations law of the United States and seek to bring to this Court's attention a core foreign relations law principle that is of enduring importance in interpreting United States statutes. As announced by Chief Justice Marshall, "an Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and, consequently can never be construed to violate . . . rights . . . further than is warranted by the law of nations." *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

SUMMARY OF ARGUMENT

Relevant treaty-based and customary international law (and the Geneva Prisoner of War Convention and the Geneva Civilian Convention, in particular) provides rights to Respondents, including rights to an effective remedy against Iraq. Under venerable Supreme Court doctrine, relevant federal legislation must be interpreted consistently with international law and, therefore in this instance, with rights of Respondents under international law to obtain compensation and damages. After proper interpretation of a relevant statute, even if there is still a potential clash between relevant federal legislation and treaty law of the U.S., additional venerable Supreme Court doctrine requires the primacy

of treaty-based rights in this instance because there is no clear and unequivocal expression of congressional intent to override such treaty-based rights within relevant legislation. Even if there had been an expression of such a clear and unequivocal intent, exceptions to the last in time rule (which rule might otherwise result in the primacy of a subsequent federal statute) would be applicable.

ARGUMENT

I. Rights of Respondents Exist Under International Law.

In this instance, Respondents, who are American former prisoners of war and civilians, have rights under treaties and customary international law, especially the right to compensation, reparation or damages. Their rights exist, for example, under Article 3 of the 1907 Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, 36 Stat, 2277, T.S. No. 539 (Oct. 18, 1907) (a "belligerent . . . shall . . . be liable to pay compensation")[2]; Article 131 of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316 ("liability incurred . . . in respect of breaches" of the Convention)[3]; and Article 148 of the Geneva Convention

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[2] Iraq has not ratified this treaty, but it was recognized as reflecting customary international law by 1939 in the International Military Tribunal at Nuremberg. *See, e.g.*, Jordan J. Paust, M. Cherif Bassiouni, *et al.*, *International Criminal Law* 6, 463, 639 (3 ed. 2007).

[3] Iraq and the U.S. are parties to this treaty and it also reflects customary international law.

Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 (same).[4] Such rights also exist under customary laws of war. More generally, Justice Breyer has recognized that universal jurisdiction with respect to "torture . . . and war crimes" "necessarily contemplates a significant degree of civil tort recovery." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J., concurring).

Concerning rights to a remedy and compensation for violations of the 1949 Geneva Conventions, see also 1 Commentary, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 83-84 (ICRC, Jean S. Pictet ed. 1952) (rights exist and claims are "to be evoked before an appropriate national court by the protected person who has suffered the violation"); 3 Commentary, *Geneva Convention Relative to the Treatment of Prisoners of War* 630 (ICRC, Jean S. Pictet ed. 1960) (a violator state is "liable to pay . . . material compensation for breaches of the Convention"); 4 Commentary, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 209-11 (ICRC, Jean S. Pictet ed. 1958); U.N. S.C. Res. 674, paras. 8-9 (Iraq "is liable for any loss, damage or injury arising in regard to . . . [certain states] and their nationals") (Oct. 29, 1990); U.N. S.C. Res. 670, para. 13

[4] Iraq and the U.S. are parties to this treaty and it also reflects customary international law. The obligation in Article 148, like that in the Geneva Prisoner of War Convention, is set forth in mandatory "shall" language as a self-executing obligation, since it is a "negative" obligation requiring no subsequent legislative or executive action to take effect. It is binding on all States Parties to the Convention, including both the United States and Iraq.

(Sept. 25, 1990) (regarding violations of Geneva law and other international law in Kuwait, "Iraq . . . is liable under the Convention for grave breaches committed by it, as are individuals"); Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 Harv. Int'l L.J. 503, 516 & n.45 (2003) [hereinafter Paust, *Judicial Power*], quoted elsewise in *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004).

Respondents also have customary rights to compensation reflected in Article 14(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (Dec. 10, 1984).[5] Further, Respondents have treaty-based and customary rights to a remedy and access to courts in Articles 2(3)(a), 14(1),[6] and through Article 50, of the International Covenant on Civil and Political

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[5] Iraq had not ratified this treaty, so the Convention does not provide treaty-based rights vis-à-vis Iraq at the relevant times.

[6] ICCPR, *supra*, arts. 2(3)(a) ("ensure that any person whose rights . . . are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity"), 14(1) ("All persons shall be equal before the courts and tribunals. In the determination of . . . his rights and obligations in as suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law"), 999 U.N.T.S. 171 (Dec. 9, 1966) [hereinafter ICCPR]. Both provisions are set forth with mandatory "shall" language that is typically self-executing.

Rights (ICCPR), 999 U.N.T.S. 171 (Dec. 9, 1966),[7] as supplemented by General Comments of the Human Rights Committee under the auspices of the treaty. Article 50 of the Covenant mandates that all of "[t]he provisions of the present Covenant shall extend to all parts of federated States without any limitations or exceptions,"[8] thereby assuring that rights and duties under the treaty apply in judicial proceedings within the United States. *See also* Jordan J. Paust, Jon M. Van Dyke, Linda A. Malone, *International Law and Litigation in the U.S.* 340-42 (2d ed. 2005); *Dubai Petroleum Co.* v. *Kazi*, 12 S.W.3d 71, 82 (Tex. 2000) ("Article 14(1) [of the ICCPR] requires all signatory countries to confer the right of equality before the courts . . . [and] guarantees . . . equal access to these courts" to pursue a remedy); H.R. Comm., General Comment No. 20, para. 15 (1992) ("right to an effective remedy, including compensation"), U.N. Doc. HRI/GEN/

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[7] Iraq ratified this treaty on January 25, 1971, although the U.S. did not ratify until April, 1992.

[8] ICCPR, *supra* art. 50. Article 50 is set forth with mandatory "shall" language that is typically self-executing. Moreover, it expressly requires that all provisions of the Covenant apply in all parts of a federated state without exception. The United States had no reservation with respect to Article 50 and it operates within the United States. *See Jordan J. Paust, International Law as Law of the United States* 362 (2 ed. 2003) [hereinafter *Paust, International Law*]. Further, the attempted declaration of partial non-self-execution (it does not apply to Article 50) was recognized as being void *ab initio* as a matter of law. *Id.* Articles 2(3)(a) and 14(1) are expressed in mandatory "shall" language that is typically self-executing. *See id.* at 72, 90 n.98, 129-30 n.14.

1/Rev.1 at 30 (1994); H.R. Comm., General Comment No. 24, paras. 11 ("[A] State could not make a reservation to Article 2, paragraph 3, of the Covenant, indicating that it intends to provide no remedies for human rights violations. Guarantees such as these are an integral part of the structure of the Covenant and underpin its efficacy"), 12 ("where there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts . . . all the essential elements of the Covenant guarantees have been removed" and an attempted reservation to that effect is void *ab initio* as a matter of law because it "would be incompatible with the object and purpose of the Covenant." *Id.* at paras. 9, 11-12); U.N. GAOR, U.N. Doc. CCPR/C/Rev.1/add.6 (2 Nov. 1994).

The human rights of Respondents also apply universally and in all social contexts as part of the legal obligation of all members of the United Nations under the United Nations Charter to ensure "universal respect for, and observance of, human rights."[9] These rights

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[9] *See, e.g.*, U.N. Charter, arts. 55(c), 56; Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance With the Charter of the United Nations, U.N. G.A. Res. 2625 (Oct. 24, 1970), 25 U.N. GAOR, Supp. No. 28, at 121, U.N. Doc. A/8028 (1971) ("Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter."); *Filartiga v. Pena-Irala*, 630 F.2d 876, 881-82 (2d Cir. 1980) (observing with respect to Articles 55(c) and 56 of the Charter that "the guarantees include, at a bare minimum, the right to be free from torture. This prohibition has become part

(Cont'd)

include "the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights" of individuals. Universal Declaration of Human Rights, U.N. G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810, at 71 (1948). The U.N. General Assembly has reaffirmed the need for a remedy with respect to ill-treatment of human beings in violation of relevant human rights. *See, e.g.*, U.N. G.A. Res. 63/166, para. 18 (18 Dec. 2008) ("Stresses that national legal systems must ensure that victims of torture and other cruel, inhuman or degrading treatment or punishment obtain redress, are awarded fair and adequate compensation and receive appropriate social and medical rehabilitation"), U.N. Doc. A/RES/63/166 (19 Feb. 2009); U.N. G.A. Res. 62/148, para. 13 (18 Dec. 2007), U.N. Doc. A/RES/62/148 (4 Mar. 2008).

We also note that it is classic international law that a state is liable for its actions, and that a change of government does not release that liability. This is also the official view of the United States. Any other rule would severely undermine the rule of law in international affairs.

(Cont'd)

of customary international law, as evidenced and defined by the Universal Declaration of Human Rights, General Assembly Resolution 217 (III) (A) (Dec. 10, 1948) which states in the plainest of terms, 'no one shall be subjected to torture.' The General Assembly has declared that the Charter precepts embodied in this Universal Declaration 'constitute basic principles of international law.' G.A. Res. 2625 (XXV) (Oct. 24, 1970)" [the 1970 Declaration on Principles of International Law]).

II. Rules Recognized By This Court Require the Primacy of International Legal Rights of Respondents.

A. Relevant Legislation Must Be Interpreted Consistently With International Law.

Relevant federal legislation must be interpreted consistently with international law and, therefore, must be interpreted consistently with the rights of Respondents under treaty-based and customary international law, including their rights to an effective remedy noted in Part I, *supra*. As this Court famously recognized in *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 117-18 (1804) (Marshall, C.J.), "[a]n Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently can never be construed to violate . . . rights . . . further than is warranted by the law of nations." Importantly, Chief Justice Marshall's recognition added the point that statutes "can never be construed to violate" rights under international law, although international law might place limits on such rights. There were other early recognitions of this fundamental rule of construction. *See, e.g., Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801); 1 Op. Att'y Gen. 26, 27 (1792); *see also id.* at 53 (stating that the municipal law is strengthened by the law of nations); *Ross v. Rittenhouse*, 2 U.S. (2 Dall.) 160, 162 (Pa. 1792); *The Resolution*, 2 U.S. (2 Dall.) 1, 4 (1781); 11 Op. Att'y Gen. 297, 299–300 (1865); 9 Op. Att'y Gen. 356, 362–63 (1859); *The Ship Rose*, 36 Ct. Cl. 290, 301 (1901); *The Schooner Nancy*, 27 Ct. Cl. 99, 109 (1892); *Rutgers v. Waddington*, Mayor's Court of the City of New York (1784) (cited in 2

American Legal Records, Select Cases of the Mayor's Court of New York City 1674–1784, at 302 (R. Morris ed. 1935)) (construing the 1783 N.Y. Trespass Act consistently with the Treaty of Peace), discussed in 1 *The Law Practice of Alexander Hamilton* 413–14 (J. Goebel ed. 1964); G. Wood, *The Creation of the American Republic* 1776–1787, at 457–58 (1969). This paramount rule of construction has been reiterated in many modern judicial opinions in this Court and others. *See, e.g.*, Paust, Van Dyke, Malone, *supra* at 155-56, and cases cited therein and in Part II.B. *infra*.

Here, there is no legislation that might suggest a clash with the rights of Respondents under the laws of war and other international law, but if there were, the legislation would have to be interpreted so as to avoid any clash with and "never ... to violate" their rights under international law.

B. Treaty Rights Would Trump Inconsistent Legislation In Any Event.

As noted, the rule of construction affirmed in *The Charming Betsy* has been retained by the Supreme Court. Additionally, there has been built into such a rule a stronger primacy for international treaty law, since under the revised rule of construction an unavoidable clash between a treaty or other international agreement and an act of Congress will not even arise unless there is a clear and unequivocal expression of congressional intent to supersede the treaty within the statute. In other words, even if the statute is subsequent in time, treaty law will prevail unless there is a clear and unequivocal expression of congressional intent to

override a particular treaty. *See, e.g.*, *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982) (a "congressional expression [to override is] necessary"); *Cook v. United States*, 288 U.S. 102, 120 (1933) (the purpose to override or modify a treaty must be "clearly expressed": "A treaty will not be deemed to have been abrogated or modified [domestically] by a later statute unless such purpose on the part of Congress has been clearly expressed"); *Cheung Sum Shee v. Nagle*, 268 U.S. 336, 345-46 (1925) (the "Act must be construed with the view to preserve treaty rights unless clearly annulled, and we cannot conclude . . . a congressional intent absolutely to exclude"); *United States v. Lee Yen Tai*, 185 U.S. 213, 221 (1902) (the "purpose . . . must appear clearly and distinctly from the words used" by Congress); Paust, *International Law, supra* note 8, at 99, 107, 120, 124-125 nn.2-3, and other cases cited; *see also Spector v. Norwegian Cruise Line, Ltd.*, 545 U.S. 119, 142 (2005) (Ginsburg, J., concurring); *Beharry v. Reno*, 183 F. Supp. 2d 584, 593–602 (E.D.N.Y. 2002) (regarding statutory construction consistent with the ICCPR and other international law); *United States v. The Palestine Liberation Org.*, 695 F. Supp. 1456, 1465, 1468 (S.D.N.Y. 1988) ("Only where a treaty is irreconcilable with a later enacted statute and Congress has clearly evinced an intent to supersede a treaty . . . does the later enacted statute take precedence. *E.g.*, *The Chinese Exclusion Case*, . . . 130 U.S. [581] at 599-602 [1889] (finding clear intent to supersede); *Edye v. Robertson* (*The Head Money Cases*), 112 U.S. 580, 597-99 . . . (1884) (same. . . .) . . . [also citing *Cook*, among other cases]. . . . *Chew Heong* [112 U.S. 536 (1884)] and its progeny . . . require the clearest of expressions on the part of Congress.").

Because no clash will be found to arise where there is no clear and unequivocal expression of congressional intent to override a treaty within a relevant federal statute, application of the last in time rule that might otherwise lead to the primacy of a federal statute that was enacted after a relevant treaty was ratified by the President will not be possible.

In this instance, there is no clear and unequivocal expression of congressional intent to supersede any relevant treaty or treaty-based right of Respondents that is expressed within the relevant statute, *i.e.*, within section 1503 of the Emergency Wartime Supplemental Appropriations Act for the Iraq War, Pub. L. No. 108-11, 117 Stat. 559 (2003) (EWSAA). In fact, there is no mention of any court, the jurisdiction of any court, or a supposed delegation of court-stripping power to the President. *See also Acree v. Republic of Iraq*, 370 F.3d 41, 51, 55 (D.C. Cir. 2004) (it was "not intended to alter the jurisdiction of the federal courts under the FSIA"). Further, the sense of Congress was clearly expressed in the 2008 National Defense Authorization Act (NDAA), § 1083(c)(4), Pub. L. No. 110-181 (Jan. 28, 2008), 122 Stat. 343-44, when Congress declared: "[n]othing in section 1503 of the Emergency Wartime Supplemental Appropriations Act . . . has ever authorized, directly or indirectly, the . . . removal of the jurisdiction of any court of the United States." There, Congress clearly supported judicial power to continue American former prisoner of war and civilian cases and clearly stated that it had never intended directly or indirectly to give the President any power to remove the jurisdiction of any court. *See also Simon v. Republic of Iraq*, 529 F.3d 1187, 1194 (D.C. Cir. 2008) ("Reading the NDAA, as we do, to

leave intact jurisdiction over cases pending under former § 1605(a)(7)"). Indeed, the Congress of the United States, which has passed multiple resolutions supporting our 1991 Gulf War POWs, would never have authorized the President to enter our courts on the side of their torturers to seek effectively to absolve them of liability, much less retroactively to seek to remove the jurisdiction of the federal district court which awarded the POWs' judgment.

Clearly, relevant treaty rights of Respondents must prevail under *Weinberger*, *Cook*, *Lee Yen Tai*, and other Supreme Court cases, since there was no clear and unequivocal expression of congressional intent in any federal statute to deny rights of Respondents under any treaty of the United States, especially their rights to pursue remedies in the courts. Later, in the 2008 National Defense Authorization Act, Congress even expressed its intent not to strip federal courts of jurisdiction to hear rights of American former prisoners of war and civilians under the laws of war and other international law.

C. Exceptions to the Last In Time Rule Would Apply Even If the Last In Time Rule Could Apply.

Even assuming that Congress had clearly and unequivocally expressed an intent in legislation to supersede any relevant treaty rights of Respondents and the last in time rule might otherwise come into play, decisions of this Court have recognized that there is a "rights under" treaties exception to the last in time rule

that would necessarily guarantee the primacy of treaty-based rights of Respondents in these cases. There has also been recognition of a law of war exception.

1. The "Rights Under" Treaties Exception.

The first exception to the last in time rule in these cases would be the "rights under" treaties exception that has been recognized in several Supreme Court and other cases. *See, e.g.*, *Jones v. Meehan*, 175 U.S. 1, 32 (1899); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 247 (1872); *Reichart v. Felps*, 73 U.S. (6 Wall.) 160, 165-66 (1867); *Wilson v. Wall*, 73 U.S. (6 Wall.) 83, 89 (1867); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 631-32 (1857) (Curtis, J., dissenting); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 749, 755 (1835); Paust, *International Law, supra* note 8, at 104-05, 120, 137-39 nn.39-49, revised from 28 Va. J. Int'l L. 393, 410-14 (1988); *see also Smith v. Stevens*, 77 U.S. (10 Wall.) 321, 327 (1870) (stating that a joint resolution of Congress could not relate back to give validity to a land conveyance that was void under a treaty); *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232-33 (1850) (an 1836 act of Congress could not "help the patent, it being of later date than the treaty" of 1824 which had conferred part of the title to property in others); *Chase v. United States*, 222 F. 593, 596 (8th Cir. 1915) ("Congress has no power . . . to affect rights . . . granted by a treaty"), *rev'd on other gds.*, 245 U.S. 89 (1917); *Elkison v. Deliesseline*, 8 F. Cas. 493, 494-96 (C.C.D.S.C. 1823) (No. 4,366) (Johnson, J., on circuit) (state law attempting to allow seizure of "free negroes and persons of color" on ships that come into its harbors directly conflicts with the "paramount and exclusive" federal commerce power, "the treaty-making power,"

and "laws and treaties of the United States" by "converting a right into a crime," and a plea of necessity to protect state security does not obviate the primacy of the laws and treaties of the U.S. Further, a restriction of a treaty right by legislation, "even by the general government," cannot prevail).

Clearly, the Respondents in these cases have relevant rights under treaties of the United States (including the Geneva Prisoner of War Convention, the Geneva Civilian Convention, and the United Nations Charter – *see* Part I *supra*) and, under venerable Supreme Court rulings recognizing the "rights under" treaties exception to the last in time rule, such rights would ultimately prevail even against federal legislation enacted after ratification of relevant treaties.

2. The Law of War Exception.

The second exception to the last in time rule in these cases would be the law of war exception, which guarantees the primacy of the laws of war. *See, e.g.*, *Miller v. United States*, 78 U.S. (11 Wall.) 268, 315-15 (1870) (Field, J., dissenting); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.) ("If a general war is declared [by Congress], its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations" – thus recognizing that congressional power is restricted by the laws of war); 11 Op. Att'y Gen. 297, 299-300 (1865) ("Congress cannot abrogate [the "laws of war"] . . . laws of nations . . . are of binding force upon the departments and citizens of the Government. . . . Congress cannot abrogate them or authorize their infraction. The Constitution does not

permit this Government [to do so either]"); Paust, *International Law, supra* note 8, at 106-07, 120, 141-42 nn.52-57; Representative Albert Gallatin, remarks, 8 *Annals of Cong.* 1980 (1798) ("By virtue of . . . [the war power], Congress could . . . [act], provided it be according to the laws of nations and to treaties."), quoted in *United States ex rel. Schlueter v. Watkins*, 67 F. Supp. 556, 564 (S.D.N.Y. 1946); *see also United States v. Macintosh*, 283 U.S. 605, 622 (1931), *overruled on other gds., Girouard v. United States*, 328 U.S. 61, 69 (1945) (the war power "tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law"); *Tyler v. Defrees*, 78 U.S. (11 Wall.) 331, 354-55 (1871) (Field, J., dissenting); *The Charming Betsy*, 6 U.S. at 77 (counsel arguing that "[a]s far as Congress have thought proper to legislate us into a state of war, the law of nations in war is to apply"). More generally, the Founders, Framers and early judiciary affirmed the fundamental expectation that Congress is bound by the law of nations. *See, e.g.*, Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. Davis J. Int'l L. & Pol'y 205, 217-39 (2008), and cases cited.

Clearly, the Respondents in these cases have relevant rights under the laws of war (*see* Part I *supra*) and, under the law of war exception to the last in time rule, such rights would ultimately prevail even against a newer federal statute.

III. The Judiciary Has Authority to Protect Rights of Respondents.

The Judiciary has authority to protect rights of Respondents. As Chief Justice Marshall recognized concerning the textual commitment to the judiciary of authority to decide cases arising under treaties, "[t]he reason for inserting that clause [Article III, § 2 of the U.S. Constitution] was, that all persons who have real claims under a treaty should have their causes decided" by the judiciary and that "[w]henever a right grows out of, or is protected by, a treaty, . . . it is to be protected" by the judiciary. *Owings v. Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 348-49 (1809). The next year, he confirmed a fundamental expectation of the Framers concerning an essential reach of judicial power when he affirmed that our judicial tribunals "are established . . . to decide on human rights." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810).[10] With respect to judicial power and the laws of war in particular, this Court has stressed, "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes . . . the status, rights and duties of . . . individuals." *Ex parte Quirin*, 317 U.S. 1, 27 (1942). The Geneva Conventions expressly recognize private rights and contemplate compensation in courts of law, a sanction practice that predates the conventions and exists more generally with respect to

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[10] Concerning the rich history of Founder, Framer, and judicial attention to human rights (which are generally at stake in these cases) and their use in thousands of federal and state cases, *see, e.g.*, Paust, *International Law*, *supra* note 8, at 193-223.

violations of treaty-based and customary laws of war. *See, e.g.*, Paust, *Judicial Power*, *supra* at 516 & nn.43-45, and cases cited. Additionally, other rights "grow out of" the Geneva Conventions, the ICCPR, and the United Nations Charter within the meaning of *Owings*. *See, e.g., id.*

Never in the history of this country has the Supreme Court ever held that an act of Congress that mentions neither jurisdiction nor the courts is capable of stripping the courts of jurisdiction and never has any such power been found to be delegatable to the Executive branch to prevent judicial review of presidential action.

Our soldiers who have been prisoners of war and civilians who were kidnapped and tortured deserve any logical and policy-serving interpretation of the law in favor of what are clearly their rights under international law. A counter interpretation could have a devastating effect in encouraging future torture and inhumane treatment of American prisoners of war, would threaten the rule of law, and would pose a serious threat to judicial independence that is not countenanced by the Constitution.

CONCLUSION

Respondents in these cases have rights under international law, including rights to an effective remedy against Iraq. Under venerable Supreme Court doctrine, relevant federal legislation must be interpreted consistently with international law and, therefore in this instance, with rights of American former prisoners of war and civilians under international law to obtain

compensation and damages. Even if there is still a potential clash between relevant federal legislation and treaty law of the U.S., additional venerable Supreme Court doctrine requires the primacy of treaty-based rights in this instance because there is no clear and unequivocal expression of congressional intent to override such treaty-based rights within relevant legislation. Even if there had been such a clear and unequivocal expression of intent, application of the "rights under" treaties exception to the last in time rule or the law of war exception would result in the primacy of the treaty-based rights of American former prisoners of war and civilians.

We urge this Court to apply *The Charming Betsy* rule of construction and affirm the Court of Appeals decision below rejecting the interpretation of Section 1503 of EWSAA that would violate the treaty obligations of the United States by absolving Iraq of liability for its brutal torture of American POWs and civilians during the 1991 Gulf War.

Amicus curiae the Human Rights Committee of the American Branch of the International Law Association respectfully request affirmance of the decisions of the Court of Appeals below with respect to Section 1503 of the 2003 Emergency Wartime Supplemental Appropriations Act.

Respectfully submitted,

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IN THE

Supreme Court of the United States

REPUBLIC OF IRAQ, *et al.*,

Petitioners,

v.

ROBERT SIMON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF DR. STEPHEN NEALE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Republic of Iraq possesses sovereign immunity from the jurisdiction of the courts of the United States for the torture of U.S. civilians and military personnel.

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BRIEF OF DR. STEPHEN NEALE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae Dr. Stephen Neale is Distinguished Professor of Philosophy and Linguistics, and John H. Kornblith Family Chair of the Philosophy of Science and Values, The Graduate Center of the City University of New York. Dr. Neale is a specialist in the philosophy of language. He has written and lectured extensively about language, meaning, and interpretation, and more generally about issues at the intersection of philosophy and linguistics. The principal focus of this work is the nature of the distinction between explicit and implicit content, and the respective roles of grammar, context and pragmatic reasoning in resolving linguistic underdetermination and indeterminacy, Neale has been certified as an expert on behalf of the federal government in the area of information content and the theoretical bases of linguistic classification and the classification of text documents for content in *American Civil Liberties Union v. Gonzales*. *See* 478 F. Supp. 2d 775, 785 (E.D. Pa. Mar. 22, 2007).

This case presents significant issues concerning statutory interpretation and, consequently, presents an opportunity for the Court to use both the tools and results of empirical linguistics and the philoso-

[1] No counsel for party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or his counsel, made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

phy of language in determining the plain meaning of statutory language. As a philosopher and linguist with particular interest and expertise in the nature of interpretation, Dr. Neale's expertise could be beneficial to the Court.

SUMMARY OF ARGUMENT

The Court should use the tools and results of linguistic theory, which provide a principled rationale in determining the plain meaning of statutory language. This case provides the perfect opportunity for the Court to do so. The careful application of linguistic tools to the relevant statutory language demonstrates that section 1503 of the Emergency Wartime Supplemental Appropriations Act ("EWSAA") did not, by virtue of its plain meaning, authorize the President to strip the federal courts of jurisdiction to hear cases brought against Iraq pursuant to Section 1605(a)(7) of the Foreign Sovereign Immunities Act ("FISA").

ARGUMENT

I. THIS COURT SHOULD USE THE TOOLS OF AND RESULTS FROM LINGUISTIC THEORY IN DETERMINING THE PLAIN MEANING OF STATUTORY LANGUAGE.

This Court should use the tools and results of linguistic theory in determining the plain meaning of statutory language. Justice Scalia's observation that "Every statute that comes into litigation is to some degree ambiguous," does not undermine the idea of the "plain meaning" of a text.[2] But it does underscore

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[2] *See* Antonin Scalia 22 *Common-Law Courts in a Civil Law System: The Role of the United States Federal Courts in* Interpreting the Constitution and Laws, *in* A Matter of Interpreta-

the need to exercise caution and acknowledge something long acknowledged by linguists, philosophers of language, and cognitive scientists: the plain meaning of a text goes beyond the meanings of the words it contains and beyond what can be obtained by formalistically projecting those meanings through the lens of grammatical structure.[3] As Justice Holmes once put it, a document is sure to have "a certain play in the joints . . . It does not disclose one meaning conclusively according to the laws of language."[4]

The Court seems to assume that in the language of statutes, and more generally in the tortured prose of lawyers or legislators, reliance on linguistic context and pragmatic principles of linguistic interpretation is subordinate to what the Court deems is the "plain meaning." According to linguistic theory, this would be wrong.[5] Certainly, the lawyer and the legislator both aim to minimize such reliance and eliminate ambiguity. But the complete eradication of

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tion (Princeton 1997); *see also* Lawrence Solan 117 *The Language of Judges* (Chicago 1993).

[3] John Searle, *Expression and Meaning*, *passim* (Cambridge Univ. 1979); Dan Sperber and Deirdre Wilson, *Relevance: Communication and Cognition*, *passim* (Harvard 1986); Robyn Carston, *Thoughts and Utterances: The Pragmatics of Explicit Communication* (Blackwell 2002); François Récanati, *Literal Meaning* (Cambridge 2004); Stephen Neale, *Pragmatism and Binding*, *passim*, in Z. Szabó-Gendler *Semantics and Pragmatics* (Oxford Univ. 2005); Stephen Neale Expert Report of Stephen Neale submitted by Defendant Attorney General Alberto R. Gonzales at 93-102, in *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff'd*, 534 F.3d 181 (3d Cir. 2008).

[4] Oliver Wendell Holmes, Jr., *The Essential Holmes*, 297 (1899), Ed. Richard A. Posner (Chicago Univ. 1997).

[5] Lawrence Solan 118-21 *The Language of Judges* (Chicago Univ. 1993)

ambiguity is rare, if possible at all.[6] Therefore, appeals to linguistic context and pragmatic principles of interpretation are essential in determining the plain meaning of statutory language.

A. Tools and Results of Linguistic Theory Provide a Principled Rationale for Determining the Plain Meaning of Statutory Language

Linguistic theory, the philosophy of language and cognitive science provide a concrete framework, within which it is possible to articulate a principled rationale for determining the plain meaning of statutory language. These "linguistic tools" include the theories of grammatical structure, linguistic context and pragmatic inference. The absence of such a framework has hampered the Court's ability to provide rules in the consistent interpretation of the plain meaning of statutory language, particularly in cases where the Court is analyzing potential restrictions on phrases introduced by quantifier words, such as "any" and "some."

1. The Limitations of Grammatical Structure in Determining Plain Meaning

Grammatical structure, as determined by linguistic theory, can impose limitations on the interpretation of text. Sometimes the interpretation of a

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[6] *See,* Dan Sperber and Deirdre Wilson, *Relevance: Communication and Cognition*, 191-93 (Harvard 1986); Sperber Robyn Carston, *Thoughts and Utterances: The Pragmatics of Explicit Communication*, 64-78 (Blackwell 2002); François Récanati, *Literal Meaning* 83-86 (Establishing that sentences are irreducibly context-sensitive.) (Cambridge 2004). One is reminded again of J. Holmes' talk of "play in the joints" *Supra*.

given expression is determined unambiguously by a fact of grammar. Other times, the very same expression has its interpretation only narrowed by grammar. Contrast the following examples:

1. John said Paul shaves himself.

2. John told Paul about himself.

In example 1, the rules of English grammar dictate that "himself" must look back to "Paul" for its interpretation. By contrast, example 2 is ambiguous: "himself" may look back to either "Paul" or "John." So interpreting "himself" in example 2 requires going beyond what is given by word meaning and grammar, *i.e.*, it requires appealing to context. When the courts are attempting to garner the plain meaning of statutory language, word meaning and grammatical structure may provide sufficient restrictions on the interpretation, but often, this is not the case.

For example, in *Ali v. Federal Bureau of Prisons*, the court was asked to determine the meaning of the phrase "any other law enforcement officer" as it was used in a provision of the Federal Tort Claims Act ("FTCA"). The majority correctly observed that, "read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"[7] However, the combined force of syntactic theory, semantic theory and pragmatic theory dictate that whenever there is an implicit restriction to be found on the interpretation of a qualifier phrase introduced by "any," it is not on the interpretation of "any," but on the interpretation of the ex-

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[7] *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's THIRD NEW INTERNATIONAL DICTIONARY 97 (1976))

pression *modified* by "any" (e.g. "other law enforcement officer").

In linguistics, logic, and philosophy, "any," along with "every," "each," "all," "no," "many," "few," "some", "most," "much," "a(n)", "the", "one," "two," "three" etc. are *quantifier* words (known as determiners). A quantifier word combines with a nominal, simple (e.g. "officer") or complex (e.g. "law enforcement officer," "other law enforcement officer") to form a *quantifier phrase*.[8] These labels highlight the fact that quantifier phrases are used to talk about quantities or proportions of individuals ("all dogs") or substances ("all beer").

Typically, a sentence containing a quantifier phrase defies sensible interpretation unless the reach of the quantifier's nominal is implicitly restricted or qualified in some way readily inferable from context.[9] This is where the Court in *Ali* and

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[8] *See* Barwise & Cooper *Generalized Quantifiers and Natural Language*, LINGUISTICS & PHILOSOPHY 4 (1981); Robert May *Logical Form: Its Structure and Derivation*, *passim* (MIT 1985); Stephen Neale, *Descriptions* 38–47 (MIT 1990); Stanley Peters & Dag Westerståhl *Quantifiers in Language and Logic*, *passim* (Oxford 2006).

[9] *See Ali v. Federal Bureau of Prisons*, 128 S. Ct. 831, 850 (2008) (J. Breyer, dissenting) ("[W]ords such as "all," "any," "never," and "none" normally rely upon context to indicate the limits of time and place within which they intend those words to do their linguistic work"); Stephen Neale, *Descriptions* 93-95 (MIT 1990) (establishing that this "is a quite general fact about the use of quantifiers in natural language" 95); Jason Stanley, *Nominal Restriction* 365-77 in G. Preyer & G. Peter (eds.) *Logical Form and Language* (Oxford 2002) (establishing that restrictions on the interpretation of quantifier phrases are the products of restrictions on the interpretation of their nominals).

other instances, such as *Gonzales*[10] and *Harrison v. PPG Industries, Inc.*, could have benefited from drawing on linguistic theory.[11]

For example, in footnote 4 in *Ali*, the Court referenced cases in which the Court correctly focused its analysis on the whole quantifier phrase, comprising the quantifier and the nominal, when determining the implicit restriction and not on the quantifier word "any."[12] The analysis of the cases in footnote 4 drew upon immediate linguistic context in identifying the correct restriction because in those cases the Court appreciated that the content of the restriction on the reach of the quantifier phrase does not derive from a restriction on the reach of "any." The Court's attempt in footnote 4 to create exceptions to the gen-

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[10] 446 U.S. 578 (1980).

[11] Examples are ubiquitous. For instance, if a law professor asks, "Can everyone see the screen?" at the beginning of a lecture in which he plans to use a projector, he is not asking whether everyone in existence can see the screen, and it would be infelicitous for someone to point out that people in the Galapagos islands cannot see the screen. In this context, his use of "everyone" is implicitly understood as if it were a compression of "everyone here" or "everyone in this auditorium." If he asks a colleague, "Under what conditions can the President appoint a Justice without Senate approval?" he unreflectively assumes the colleague takes him to mean the President of the United States rather than, say, the President of France or the President of IBM. *See* Stephen Neale, *Descriptions* 93-95 (MIT 1990) (discussing examples from which these two are adapted). See *Ali*, 128 S. Ct. at 850 (J. Breyer, dissenting) (discussing an example from which this one is adapted—his utterance of 'There isn't any butter' to his wife assumes a common sense restriction to the refrigerator, or some other contextually relevant locale, *e.g.*, the kitchen).

[12] *Ali*, 288 S. Ct. at note 4.

eral rule that "any" is expansive in meaning is unnecessary and problematic in devising a uniform and constructive application in future cases because it conflicts with what linguistic theory tells us about the nature of implicit restrictions on the interpretation of quantifier phrases.

2. The Role of Linguistic Context in Determining Plain Meaning

In many cases, linguistic context contains the information needed to identify an implicit restriction, indeed preceding material within the same clause is often all the linguistic context that is needed. Informally, the linguistic context of an expression is just nearby language in the text. This could be made more precise by specifying a domain, *i.e.*, a clearly defined portion of text within which occurs (*e.g.*, a particular phrase, sentence, paragraph). Beginning with the smallest domain as possible and expanding only as necessary constitutes a procedure for remaining as faithful to the text as possible given the necessity of invoking linguistic context in statutory interpretation.

For example, you say to your friend, "There is food in the refrigerator. Take anything you like." Your use of the second sentence would not give your friend the authority to take your wallet or your wife, or for that matter the refrigerator itself or its cooling system. What your friend is being offered is naturally restricted by common sense and your use of a specific phrase in the *first* sentence ("food in the refrigerator"), which is the relevant linguistic context.

Justice Scalia has illustrated the same point about the use of linguistic context to help disambiguate an expression: "If you tell me, 'I took the boat out

on the bay,' I understand 'bay' to mean one thing; if you tell me, 'I put the saddle on the bay,' I understand it to mean something else."[13] Indeed, according to Justice Scalia, "in textual interpretation, context is everything."[14]

From the point of view of linguistic theory, Justice Scalia is correct, context *is* everything, because without it, the notion of plain meaning has no genuine application.[15] If the Court in *Ali* had appreciated the vital role that linguistic context was playing in determining plain meaning, it would have recognized the existence of an implicit restriction on the reach of the nominal, obtained without venturing outside the text.

A modicum of linguistic context is all that was needed there: the smallest phrase properly containing "any other law enforcement officer" i.e. the disjunctive noun phrase "any officer of customs or excise, or any other law enforcement officer," which comprises two noun phrases joined by "or" – the disjunction connective "or," like the conjunction connective "and," joins two expressions of the same type to form a larger, symmetrical expression of that same type. Thus, the implicit restriction the Court should have identified – namely, *engaged in custom and ex-*

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[13] Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in* Interpreting the Constitution and the Laws, in A Matter of Interpretation 26 (1997).

[14] *Id.* at 37.

[15] John Searle, *Expression and Meaning* 117-136 (Cambridge Univ. 1979) ("[t]he notion of the literal meaning of a sentence only has application relative to a set of contextual or background assumptions").

cise duties – is obtained with the bare minimum of linguistic context, that is, without going beyond the disjunctive noun phrase.[16]

The reason the Court failed to properly recognize this context was the Court's view that where the language is clear, there is no need to look for contextual clues as to the meaning of a word or phrase.[17] However, as discussed below, linguistic theory confirms the opposite; context is everything, and pragmatic inference is paramount when determining meaning.

3. The Importance of Rationality Assumptions and Pragmatic Processes in Determining Plain Meaning

The type of restrictions discussed in the previous sections are not limited to quantifier phrases. As confirmed by linguistic theory and cognitive science, the capacity to identify such restrictions is a product of continuously active, cognitive processes – usually called pragmatic processes – that make it possible, quite generally, to interpret utterances and texts, which by their very nature, are too impoverished to wear their complete interpretations on their sleeves[18] – even, as will be demonstrated shortly,

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[16] "[a]ny claim arising in respect of . . . the detention of any goods, merchandise, or other property by any officer of customs or exercise or any other law enforcement officer." *Ali* at 831.

[17] *See Ali*, at 840. ("The Court [are] unpersuaded by Petitioner's attempt to create ambiguity where the statute's text and structure suggests none.").

[18] *See* Dan Sperber & Deirdre Wilson, *Relevance: Communication and Cognition*, 188-193 (Harvard Univ. 1986); Robyn Carston, *Thoughts and Utterances: The Pragmatics of Explicit Communication* (same) (Blackwell 2002); John Searle, *Expression and Meaning* 117-136 (Cambridge Univ. 1979) ("[t]he notion of the literal meaning of a sentence only has application

when produced by lawyers or legislators bent on making the text as unambiguous as possible. In many everyday situations, the exercise of our capacity to identify implicit restrictions on the interpretation of nominals is so fast, automatic, seamless and effortless that it is simply taken for granted, if noticed at all.[19] Moreover, the capacity is not tailored specifically to the interpretation of nominals: If my daughter falls and hurts her knee, I may say, if she is still crying after an unreasonable amount of time, "You're not going to die," and whatever she may think at the time, I am not claiming she is immortal.[20]

Whenever the Court appeals to certain canons of statutory interpretation, such as *ejusdem generis*, *noscitur a sociis*, *expressio unius est exclusio alterius* and the rule against superfluities, it is tacitly deploying an important part of linguistic theory called pragmatics, which characterizes the rational cogni-

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relative to a set of contextual or background assumptions", 117); Lawrence Solan passim. *The Language of Judges* (Chicago Univ. 1993) ("the relationship between words and events in the word is underdetermined by our knowledge of the words" 185); Stephen Neale, *On Location*, in M. O'Rourke & C. Washington, *Situating Semantics* 284-302 (2007). Stephen Neale Expert Report of Stephen Neale submitted by Defendant Attorney General Alberto R. Gonzales at 93-102, in *ACLU v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff'd*, 534 F.3d 181 (3d Cir. 2008) 60-79.

[19] *See* Dan Sperber & Deirdre Wilson, *Relevance: Communication and Cognition*, 65-117 (Harvard Univ. 1986); Dan Sperber & Deirdre Wilson, *Spontaneous Deduction and Mutual Knowledge* 179-84 (1990) *Behavioral and Brain Sciences* 13; Robyn Carston, *Thoughts and Utterances: The Pragmatics of Explicit Communication, passim* (Blackwell 2002).

[20] *See* Kent Bach, *Conversational Impliciture Linguistics and Philosophy*. 28-9 (1994) *Mind & Language*, 9

tive processes involved in all linguistic interpretation.[21] Plain meaning cannot be obtained without employing the type of context-based reasoning characterized by pragmatic theory.

For example, in *Ali*, the Court first attempted to assign plain meaning to the phrase "any other law enforcement officer" before taking into account the linguistic context and the type of context-based reasoning that cognitive science has demonstrated is involved in all interpretation. The Court seems to tacitly assume that the process of interpreting statutory language can defy the natural order and process established by cognitive science and linguistic theory, and consequently the Court's process does not mimic the way people actually interpret text. The Court thereby denied itself the opportunity of obtaining an accurate interpretation of the quantifier phrase "any other law enforcement officer," because an accurate interpretation of the plain meaning of text simply cannot be determined without first exploring whether the reach of the nominal is implicitly restricted.

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[21] *See* Paul Grice, *Studies in the Way of Words*, *passim* (Harvard Univ. Press 1989) (identifying the rational basis of certain general interpretive maxims governing the quantity, quality, relevance, and mode of presentation of information in distinct contexts); *See* Dan Sperber & Deirdre Wilson, *Relevance: Communication and Cognition*, 65-117 (Harvard Univ. 1986); Dan Sperber & Deirdre Wilson, *Spontaneous Deduction and Mutual Knowledge* 179-84 (1990); *Behavioral and Brain Sciences* 13; Robyn Carston, *Thoughts and Utterances: The Pragmatics of Explicit Communication*, 15-221 (Blackwell 2002).

II. Utilizing Linguistics and the Philosophy of Language, This Court Should Find That The Plain Meaning of Proviso Two of § 1503 of EWSAA Did Not Give The President Authority to Divest the Federal Courts of Jurisdiction

A. Petitioners' Appeals to Discussions Of The Meaning Of "Any" In Opinions Of This Court Are Spurious.

Proviso two of § 1503 of the EMERGENCY WARTIME SUPPLEMENTAL APPROPRIATIONS ACT of 2003 ("EWSAA") reads, "the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism." ("Proviso Two") Petitioners and Respondents place considerable weight on the interpretation of the noun phrase "any other provision of law that applies to countries that have supported terrorism." So does the United States in its Brief as Amicus Curiae.

The Petitioner purports to rely on this Court observations concerning phrases of the same basic grammatical form as "any other provision of law . . ."—specifically, "any other term of imprisonment" (*Gonzales*, 520 U.S. 1, 5 (1997)), "any other final action . . ." (*Harrison v. PPG Indus. Inc.*, 446 U.S. 578, 588 (1980)) "any other law enforcement official" (*Ali*, 128 S. Ct. 831). The Petitioner argues that there is no need to consider linguistic context because the word "any" is expansive in meaning, that "any" means *any*, and that the analysis should end there. Petitioners appear to assume that if there is any sort of restriction, it is on the interpretation of the word "any." But Petitioner ignores the fact that, pursuant to linguistic theory, an implicit restriction is not on

the interpretation of the quantifier "any," but on the interpretation of the nominal that it modifies, "other provision of law that applies to countries that have supported terrorism." Moreover, by focusing on the word "any," Petitioner concluded that there are no restrictions whatsoever on the whole quantifier phrase.

Ironically, Petitioner tacitly *assumes*, contrary to what Petitioner explicitly states, that there is some type of restriction. As noted by Respondents, the phrase "any other provision of law that applies to countries that have supported terrorism," as it occurs here, is tacitly understood as *not* including, for example, *Russian* law, or for that matter *Iraqi* law. The fact that some implicit assumptions are so obvious underscores the need for the explicit use of linguistic context and pragmatic processes to identify implicit restrictions on the interpretation of nominals.

Thus, consistent with what Petitioner *assumes,* but inconsistent with what Petitioner *states*, the reach of "any other provision of law that applies to countries that have supported terrorism" as it occurs in Proviso Two is restricted *at least* to *United States* law—despite the fact, also noted by Respondents, that the more specific phrase "any other provision of *United States* law that applies to countries that have supported terrorism" could have been used by Congress in wording proviso two, but was not. The recognition of this restriction is an example of the unreflective use of pragmatic principles in the interpretation of quantifier phrases. Put simply, "any other provision of law . . ." defies a sensible interpretation here without such a restriction.

B. Competing Grammatical Structures of Proviso Two And Their Semantic Consequences Leads to the Conclusion that Proviso Two Is Inherently Ambiguous

Three points about the syntactic structure of the sentence Congress used to state proviso two are relevant to the present case; and at an appropriate level of detail, none of the three is uncontroversial.

1. Structure of Quantifier Phrases

As already noted, "any other provision of law that applies to countries that have supported terrorism" is quantifier phrase. And quantifier phrases, proper names, and pronouns are all species of noun phrases. A quantifier phrase, as also noted earlier, is made up of a quantifier and a nominal, which may be syntactically simple (*e.g.*, "provision") or syntactically complex (*e.g.*, "provision of law", "other provision", "other provision of law", or "other provision of law that applies to countries that have supported terrorism").

2. The Structure of Nominals

Matters are more complicated when we turn to the syntax of the nominal itself in the second disjunct of Proviso Two because a syntactic ambiguity—an ambiguity of *scope*, as it is usually called—must be resolved. Approaching the matter through a simpler example involving a sign is again helpful. Consider a sign outside a park that reads, "SMALL CHILDREN AND PETS NOT ADMITTED." The rules of grammar license two distinct parsings to the "small children and pets" depending upon whether "pets" is within the scope of "small" (in less theoretical terms, depending upon whether small modifies the simple nominal "children" or the conjunctive nominal "chil-

dren and pets." Using square brackets to group expressions in a way that distinguishes the parsings, "small children and animals" may be parsed in either the following ways:

[small children] and pets

small [children and pets].

Parsed in the first way, the sign outside the park expresses a prohibition on the entry of both pets and small children; parsed the second way it expresses a prohibition on the entry of *small* pets and small children—pet elephants, for example, are not barred from entry. There are two points to appreciate here: (i) the ambiguity is a direct consequence of English syntax; (ii) the fact that, *ceteris paribus*, one meaning is more plausible than the other in connection with the sign outside the park just underscores the point that commonsense, context and background have already kicked in below the radar during the fast, automatic, seamless and effortless exercise of our capacity to disambiguate.

Neither Petitioner nor Respondents noticed that, independently of any debate about implicit restriction on the nominal "other provision of law that applies to countries that have supported terrorism," there is an ambiguity of scope to consider *within* the nominal itself, and that in consequence, the rules of grammar license two distinct parsings, each associated with a slightly different meaning.[22] When these ambiguities are brought out, the paucity of Petitioner's linguistic arguments for the interpretation of Proviso Two that they appear to favor is magnified.

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[22] The introduction of the "other" creates additional ambiguity of the same type.

Scope ambiguity in the nominal is a consequence of the fact that the restrictive relative clause "that applies to countries that have supported terrorism" may modify the complex nominal "provision of law" or the simple nominal "law." Using "ϕ" as shorthand for "countries that have supported terrorism," we can distinguish these parsings thus:

(i) [provision of law][that applies to ϕ]]

(ii) provision of [law [that applies to ϕ]]

While the difference between the meanings associated with the two parsings of "small children and animals" is quickly spotted by native speakers, the difference between the meanings associated with the two parsings of "provision of law that applies to countries that have supported terrorism" is subtle: a provision falls within (ii) as long as the it is contained within a law that applies countries have supported terrorism, whether or not that provision itself applies to countries that have supported terrorism. By contrast, a provision falls within (i) only if the provision itself applies to countries that support terrorism.

3. Minimal Linguistic Context

Because the interpretations of (i) and (ii) are not equivalent in meaning, linguistic context must be invoked to disambiguate the statutory language. In accordance with the principle of linguistic context immediacy (beginning with the smallest domain as possible), the first linguistic context to consider is the smallest constituent of the text that contains "other provision of law that applies to countries that have supported terrorism" as a proper part, i.e. "section 620A of the Foreign Assistance Act of 1961 or

any other provision of law that applies to countries that have supported terrorism."

Furthermore, the absence of a comma before "or" confirms that the disjunctive noun phrase is self-contained and, in fact, the smallest linguistic constituent of text properly containing "any other provision of law that applies to countries that have supported terrorism."

C. Using Pragmatic Principles to Determine Plain Meaning of *Statutory Language*

As already noted, it is incontrovertible that the occurrence of "any other provision . . ." in Proviso Two is implicitly restricted in *some* way; the question at issue concerns the precise form of the restriction.

As explained above, the smallest linguistic context that needs to be analyzed is the disjunctive noun phrase "section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism." The next step is to apply appropriate canons of statutory interpretation whose plausibility derives from more general pragmatic principles articulated in linguistic theory.[23]

The canon of *noscitur a sociis*, as applied here, instructs the reader to comprehend words within their context – that is, in harmony with neighboring words in the smallest linguistic context. Here, the expression "Section 620A of the FAA of 1961" provides the relevant contextual cues for interpreting the phrase "any other provision of law that applies to

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[23] *See* footnote 21.

countries that supported terrorism." Therefore, an understanding of the contents of the Section 620A of the FAA of 1961 is required in order to understand the nature of the restriction. This would be similar to consulting a dictionary to understand the meaning of a word. Section 620A lists statutes that all involve foreign assistance, which is not surprising because it is named the Foreign Assistance Act. Thus, "any other provision of law that applies to countries that supported terrorism" is understood to plainly mean other provisions of law that involve foreign assistance.

Moreover, the canon of *ejusdem generis* directs the reader of a catch-all term that follows more specific terminology to confine the catch-all to items no broader than the specific term. Here, the expression "Section 620A of FAA of 1961" is the more specific term in the disjunctive noun phrase and, similar to the analysis above, provides the context to interpret the plain meaning of the phrase "any other provisions of law that applies to countries that have supported terrorism" to be restricted to other provisions of law that involve foreign assistance.

The rule against superfluities, which instructs the Court to interpret a statute to effectuate all of its provisions, so that no part is rendered superfluous, also supports this interpretation of Proviso Two. The rule against superfluities is a consequence of a well established and fully general pragmatic principles.[24]

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[24] *See* Paul Grice, *Studies in the Way of Words*, *passim* (Harvard Univ. Press 1989); *see also* Dan Sperber & Deirdre Wilson, *Relevance: Communication and Cognition*, 65-117 (Harvard Univ. 1986); Dan Sperber & Deirdre Wilson, *Spontaneous Deduction and Mutual Knowledge* 179-81 (1990); *Behavioral and Brain Sciences* 13.

In this instance, the plain meaning of the phrase is not fully appreciated if the Court ignores the role of the connection between the two halves of the disjunctive noun phrase.

The rejection of these canons of statutory interpretation would be tantamount to rejection of what linguistic theory has established about the role of pragmatic principles in ascertaining plain meaning.

CONCLUSION

For the foregoing reasons, this Court should affirm judgments of the Court of Appeals.

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No. 08-539

IN THE

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v.

ROBERT SIMON, ET AL.
RESPONDENTS,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMICUS CURIAE BRIEF OF PLAINTIFFS IN *PETERSON V. ISLAMIC REPUBLIC OF IRAN*, CA 01-2094 (RCL), 01-2684 (RCL) IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF *SIMON* RESPONDENTS

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INTEREST OF *AMICUS*

On October 23, 1983, a Hezbollah suicide bomber blew up a barracks housing United States Marines and other service personnel in Beirut, Lebanon, killing 244 Marines and serviceman. *Amicus curiae* Deborah D. Peterson, et al., ("Peterson") are family members of deceased and survivors of bombing. In 2001, they filed a lawsuit under 28 U.S.C. § 1605(a)(7) in the United States District Court for the District of Columbia, *Peterson v. Islamic Republic of Iran*, 01-2094 (RCL) and 01-2684 (RCL), before the Honorable Royce Lamberth (now Chief Judge), who granted judgment in favor of the Plaintiffs in the amount of $2,656,856,907 on September 7, 2007. ("*Peterson* judgment").

After the entry of the *Peterson* judgment, Congress passed and ultimately the President signed the National Defense Authorization Act, for Fiscal Year 2008 ("NDAA"), Public Law No. 110-181, 122 Stat. 3, § 1083 ("NDAA § 1083"), which affirmed and enhanced, in part, the rights and remedies of victims who have suffered at the hands of state sponsors of terrorism. The *Peterson* judgment is now the subject of active enforcement in multiple United States federal courts pursuant to the legislative scheme that was partially revised by the NDAA.

Petitioners Republic of Iraq, et al., ("Petitioners or Iraq") argue that § 1083 of the NDAA repealed the jurisdiction of the federal courts over pending 28 U.S.C. § 1605(a)(7) claims, which would effectively terminate further proceedings on behalf of Respondents Simon, but enabling other eligible parties to proceed under 28 U.S.C. § 1605A.

The case at bar involves questions fundamental to the effective implementation of §1083 of the NDAA, a statute having significant importance in Congress's anti-terrorism legislative scheme. These questions include:

1. Whether § 1083 of the NDAA meant to repeal the federal courts' jurisdiction over 28 U.S.C. § 1605(a)(7) cases pending before the federal courts at the time of the passage of the NDAA, and;

2. What effect did Congress intend upon 28 U.S.C. § 1605(a)(7) judgments existing at the time of the passage of the NDAA.

To avoid any adverse impact upon the historic *Peterson* judgment, Peterson argues that the passage of NDAA § 1083 does not foreclose, repeal, diminish or extinguish the federal courts' continuing jurisdiction to enforce 28 U.S.C. § 1605(a)(7) judgments or to hear § 1605(a)(7) cases pending at the time of the passage of the NDAA.[1]

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or part, and no

SUMMARY OF THE ARGUMENT

In 2008, Congress modified its anti-state sponsorship of terrorism legislative scheme by passing the NDAA into law. The precise breadth Petitioners' argument that the NDAA effected a jurisdictional repeal of 28 U.S.C. § 1605(a)(7) cases is not clear from their merits brief. Should the Court decide that the NDAA indeed divested the federal courts of their jurisdiction to enter a judgment in 28 U.S.C. § 1605(a)(7) claims pending at the time of the passage of the NDAA, *amicus curiae* argue that such a holding should not impair those claimants, such as *Peterson*, who held 28 U.S.C. § 1605(a)(7) judgments at the time of the passage of the NDAA. Such judgments are currently the subject of enforcement efforts under a new warrant of jurisdictional authority created by the NDAA.

In any event, the plain language of the NDAA rebuts Petitioners' flawed argument that the NDAA intended to divest the federal courts of jurisdiction over pending 28 U.S.C. § 1605(a)(7) cases. The NDAA retained, if not created a continuing right of enforcement under 28 U.S.C. § 1610(a)(7) that confirms the right of Respondents to prosecute and enforce their 28 U.S.C. § 1605(a)(7) claims subsequent to the passage of the NDAA. Petitioners' position would not serve any purpose other than to take away existing rights and remedies against state-sponsors of terrorism and therefore reduce the effect of Congress's careful and measured effort to compensate victims of state-sponsored terrorism.

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counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

ARGUMENT

Peterson's *amicus* brief follows Judge Posner's guidelines[2] by avoiding a restatement of the arguments already found in the parties' merits briefs regarding one of the central issues—whether the NDAA divested the federal courts of jurisdiction over § 1605(a)(7) cases pending at the time of the passage of the NDAA—and concentrating the focus of the *amicus* brief on the question whether the language of the NDAA would divest the federal courts of their jurisdiction to enforce existing § 1605(a)(7) judgments. A decision in this case could adversely effect (and potentially repeal) the jurisdiction of the federal courts over all 28 U.S.C. § 1605(a)(7) cases regardless of the stage of proceeding, whether pre or post judgment, which would include classes of cases not before this Court in this appeal, such as *Peterson*. It is therefore important to consider the ramifications of the incorrect interpretation of § 1083 of the NDAA proposed by Petitioners.

The language and structure of the NDAA confirm that 28 U.S.C. § 1605(a)(7) judgments are still

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[2] In several opinions, the Honorable Richard Posner of the United States Court of Appeals for the Seventh Circuit has enunciated useful guidelines for the filing of an *amicus curiae* brief. "The term 'amicus curiae' means friend of the court, not friend of a party." *Ryan v. Commodity Futures Trading Commission*, 125 F. 3d. 1062, 1063 (7th Cir. 1997) (citing *United States v. Michigan*, 940 F.2d 143, 164-65 (6th Cir. 1991)). Judge Posner exhorts *amicus* to file an brief which might show that *amicus*' interests might be adversely impacted by the "decision in the present case" by operation of "stare decisis or res judicata," that the amicus has "unique perspective" or "information," in excess of the offerings of the litigants, and inferentially drives home an extraordinary or key point omitted in the party's briefs. *National Organization for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000). "The judges of this court . . . will deny permission to file an amicus brief that essentially duplicates a party's brief." *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003) (quoting *National Organization for Women, Inc.*, 223 F.3d at 616).

enforceable in the post NDAA world under the jurisdictional grant of 28 U.S.C. § 1610(a)(7), which was created by the NDAA. Congress could not have therefore intended to hamper the enforcement of existing 28 U.S.C. § 1605(a)(7) judgments through the passage of the NDAA.

Peterson also rejects Petitioners' argument that the enactment of the NDAA 2008 serves as a "repealer", the effect of which would be to eliminate the jurisdiction of the federal courts from hearing any claim under 28 U.S.C. § 1605(a)(7), (Pet'rs Brief at 37-44), based upon the NDAA's creation of a enforcement provision in 28 U.S.C. § 1610(a)(7) that confirms the jurisdiction of the federal courts over 28 U.S.C. § 1605(a)(7) claims.

I. THE STRUCTURE AND PURPOSE OF SECTION 1083 OF THE NATIONAL DEFENSE AUTHORIZATION ACT OF 2008 DENIES IRAQ'S ARGUMENT THAT THE NDAA DIVESTS THE FEDERAL COURTS OF JURISDICTION TO ENFORCE OR HEAR CLAIMS BROUGHT UNDER SECTION 1605(a)(7)

A. *The passage of the NDAA did not divest the federal courts of jurisdiction over the enforcement of existing 28 U.S.C. § 1605(a)(7) judgments*

Subsection (c) of § 1083 of the NDAA contains a provision for essentially "recycling" 28 U.S.C. § 1605(a)(7) into 28 U.S.C. § 1605A claims for the purpose of obtaining access to certain further rights and remedies attendant to a claim under 28 U.S.C. § 1605A. *Peterson*, holding a valid final judgment at the time of the passage of the NDAA, chose not to "recycle" their judgments as did other 28 U.S.C. § 1605(a)(7) judgment holders and claimants, and accordingly, the *Peterson* judgment would be deemed rendered under 28 U.S.C. § 1605(a)(7).

Should the Court agree with Iraq's argument that the enactment of § 1605A serves to in effect repeal those unresolved § 1605(a)(7) claims pending at the time of the passage of the NDAA, federal courts would still retain jurisdiction over the enforcement of any § 1605(a)(7) judgments, such as *Peterson's*, even if a federal court might not be able to "hear" a claim under § 1605(a)(7).

The enactment of the NDAA, the ultimate effect of which is to replace § 1605(a)(7) with § 1605A for future claimants, did not withdraw from the federal court the jurisdiction to hear existing 28 U.S.C. § 1605(a)(7) cases or to enforce a § 1605(a)(7) judgment. Textual analysis of the language of the pertinent sections of the FSIA is required to arrive at the correct conclusion regarding Congress's intent behind of the NDAA. As a matter of statutory interpretation, the words of the pertinent sections are clear on their face. "Our objective in a case such as this is to ascertain the congressional intent and give effect to the legislative will." *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975). As the Court has noted, "[j]udicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided." *Commissioner v. Asphalt Products Co.*, 482 U.S. 117, 121 (1987).

Iraq's interpretation of § 1083 of the NDAA would operate to undercut the intended effect of Congress's legislative scheme to provide compensation to victims of state-sponsored terrorism. Section 1610(a)(7), created by the NDAA, provides federal courts with the jurisdiction to enforce a judgment under § 1605(a)(7), as follows:

> (a) The property in the United States of a foreign state, as defined in section 1603 (a) of this chapter, used for a commercial activity in the United States, shall not be immune from

> attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—
>
> . . .
>
> *(7) the judgment relates to a claim for which the foreign state is not immune under section 1605 (a)(7),* regardless of whether the property is or was involved with the act upon which the claim is based.

(emphasis added).

In 28 U.S.C. § 1610, Congress clearly distinguished between a "judgment entered under § 1605A" and a "judgment which relates to a claim" in the explicit language of the statute, which defines judgments in two separate categories. For example, in § 1610(g)(1), Congress provides the holder of a § 1605A judgment with the following rights: "[s]ubject to paragraph (3), the property of a foreign state against which a *judgment is entered under Section 1605A* . . . ." (emphasis added). This language is constructed in a parallel fashion in § 1610(g)(2), which further delineates the enforcement rights of a judgment holder under Section 1605A, as follows: ". . . upon a *judgment entered under Section 1605A* . . . ."

These subsections rely upon the difference between a judgment which "relates to" and a judgment which is "entered under." In 28 U.S.C. § 1610 Congress described different rights based upon whether a judgment holder possessed a judgment that "relate to" § 1605A or that which was "entered under Section 1605A." As a matter of statutory interpretation a court is to give plain meaning to the words of the statute – which plainly differentiates between judgments relating to § 1605A or those entered under § 1605A. *E.g., Lamie v. United States Tr.*, 540 U.S. 526, 536 (2004) ("We should prefer the plain meaning since that approach respects the

words of Congress."). In the post NDAA world, Congress provided that a federal court could enforce under § 1610(a)(7) either a judgment under § 1605(a)(7) as the judgment would necessarily "relate" to a claim under § 1605A, or a new judgment under § 1605A.

The legislative history of the NDAA confirms that the revisions created by § 1083 were intended to be made available to the *Peterson* judgment holders and any others with a similar standing. Senator Frank Lautenberg, the original co-sponsor of the legislation that became § 1083 of the NDAA, explained:

> [i]n a case known as Peterson v. the Islamic Republic of Iran, filed on behalf of many of the marine victims and their families, the U.S. District Court ruled in 2003 that the terrorist organization Hezbollah was funded by, directed by, and relied upon the Islamic Republic of Iran and its Ministry of Information and Security to carry out that heinous attack. The judge presiding over this case, Judge Royce Lamberth, referred to this as "the most deadly state sponsored terrorist attack made against United States citizens before September 11, 2001." In September of this year Judge Lamberth found that Iran not only is responsible for this attack but also owes the families of the victims a total of more than $2.6 billion for the attack. Congress's support of my provision will now empower these victims to pursue Iranian assets to obtain this just compensation for their suffering.

154 Cong. Rec. S55 (daily ed. Jan. 22, 2008) (floor statement of Sen. Lautenberg).

In other subsections of 28 U.S.C. § 1610, Congress differentiated between two kinds of judgments: both § 1605(a)(7) and § 1605A judgments. For example, § 1610(f)(1)(A) clearly envisioned two classes of judgments, as follows:

> shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under *section 1605 (a)(7) (as in effect before the enactment of section 1605A) or section 1605A.*

(emphasis added). Section 1610(f)(2)(A) likewise envisions the enforcement of both judgments, as follows:

> [a]t the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under *section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A*, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in *identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.*

(emphasis added).

Congress's expansion of assets available to a § 1605(a)(7) judgment creditor under § 1610(f)(1)(A) and authorization of the Secretary of the Treasury and Secretary of State to provide information under § 1610(f)(2)(A), all in favor of a § 1605(a)(7) creditor, provides further support that these judgments

remain enforceable subsequent to the passage of the NDAA and therefore that the federal courts retain jurisdiction over Respondents' § 1605(a)(7) cases.

Providing a § 1605(a)(7) creditor with a broader range of assets to seize, and information to assist in the enforcement process leads to the conclusion that the cases are valid and the judgments are necessarily enforceable. The repealer doctrine, asserted by Iraq, would only lead to an absurd result in which § 1605(a)(7) judgments would have a greater range of assets, assistance from the government to collect, but the court would lack the jurisdiction for such enforcement precisely anticipated by the statute itself. Federal courts traditionally seek to avoid absurd results when interpreting statutory language. *United States v. Turkette*, 452 U.S. 576, 580 (1981).

When Congress drafted and passed 28 U.S.C. § 1610(a)(7) into law in § 1083 of the NDAA, Congress made it clear that a § 1605(a)(7) judgment remains enforceable under the new law as a § 1605(a)(7) judgment would "relate" to a § 1605A claim, as required by § 1610(a)(7). The term "relate" (or relating) is defined by the NDAA in subsection (c)(3) of § 1083 as: "[a]ny other action arising out of the same act or incident . . . may be brought under Section 1605 of Title 28 United States Code . . ."

The word "related" anticipates that the § 1605(a)(7) would necessarily "arise out of the same act or incident" as would a § 1605A claim. The concept of "related" is likewise found under § 1605A(a)(2)(A)(ii), in which a court would define the jurisdiction of the court by way of a "related action," as follows:

> [i]n the case of an action that is refiled by reason of Section 1083(c)(2)(a) of the NDAA for the Fiscal Year 2008 or is filed under this section by reason of 1083(c)(3) of that act, the foreign state was designated as a state sponsor of terrorism when the original action or

> related action under Section 1605(a)(7) . . . was filed.

Congress anticipated that a court might render a judgment under § 1605(a)(7), subsequent to the passage of the NDAA, in which such a judgment would "relate" and independently be enforceable under § 1610(a)(7), and with the additional right of recovery as to certain defined assets under § 1610(f)(1)(a), and moreover, the right to receive the cooperation of the Secretary of Treasury and the Secretary of State under § 1610(f)(2)(a). Any other interpretation would conflate the terms "relate," with the terms "entered under," and therefore contravene the intent of Congress and ignore its precise drafting.

If, as Iraq contends, that NDAA § 1083 is a "repealer," of jurisdiction for § 1605(a)(7) cases, thereby also withdrawing from the federal courts the jurisdiction to consider and enforce a judgment under § 1610(a), Congress could have readily redrafted § 1610(a)(7) to state generally, "a judgment entered under Section 1605A," as opposed to its current language. Congress of course used the word "relate," not "entered under," a clear distinction that must be accorded its plain meaning. Viewing other sections of 1605A and 1610, Congress made it clear that § 1605(a)(7) cases and their judgment enforcement would survive the passage of the NDAA and be independently enforceable under FSIA irrespective of the § 1605(a)(7) judgment holders decision to recycle their claims into a § 1605A claim.

This outcome would be consistent with the practical realities in the litigation of a large case. While § 1083 of the NDAA might provide various advantages in the enforcement process or enhanced remedies to new claimants, a § 1605(a)(7) judgment creditor might rethink these advantages, in light of the fact that the judgment creditor would be obligated to "recycle" the judgment, by filing a new independent action. This independent action would literally invite the state sponsor of terrorism into the courthouse, which might prompt the tremendous

delay and expense of the relitigation of the entire matter, and potentially a different outcome. Given the significant passage of time on some of these actions, the prospect of delay or a different outcome would be a rational concern, along with the prospect of significant time, expense, and effort.

Ultimately Iraq's argument does not touch upon the validity of final § 1605(a)(7) judgments existing at the time of the passage of the NDAA. Preservation of the *Peterson* judgment itself likewise would be consistent with Iraq's arguments, which is solely limited to "pending cases" under § 1605(a)(7) as opposed to § 1605(a)(7) judgments. Repealing or limiting the jurisdiction of the federal courts to enforce a judgment, once granted, would have the effect reducing, if not vitiating rights already granted by statute, and presumption, as a matter of statutory interpretation would argue against the virtual destruction of a judgment.

Even under the doctrine of "repealing" the federal courts' jurisdiction to hear a claim against a foreign sovereign, the *Peterson* judgment would still survive because the Petitioners' proposed jurisdictional repeal is limited to the federal court's power to "hear" a case, not the power to enforce a judgment, assuming the court has the power to hear the case at the time of trial.

The passage of the NDAA did not divest the federal courts of the power of enforcement of § 1605(a)(7) judgments. This result is readily apparent, for example if a § 1605(a)(7) was heard prior to January 28, 2008—the date of enactment of NDAA 1083)—but if the judgment was rendered after January 28, 2008. This post NDAA 1083 judgment, based on a § 1605(a)(7) case remains enforceable because § 1610(a)(7) permits enforcement of a judgment if "relat[ing]" to "a claim for which the foreign state is not immune under Section 1605A . . ." By its plain language, § 1610(a)(7) does not require the recycling of a post NDAA 1083 §

1605(a)(7) and permits enforcement because the § 1605(a)(7) judgment "relates" to § 1605A as arising from the same events. Moreover § 1610(a)(7) does not limit enforcement to judgments entered under Section 1605A, nor bar enforcement of a § 1605(a)(7) judgment, regardless of the date of entry, according to the plain language of § 1610(a)(7).

B. *The passage of the NDAA did not divest the federal courts of jurisdiction over existing 28 U.S.C. § 1605(a)(7) cases*

Amicus supports the interpretation of § 1083 of the NDAA as stated by the United States Court of Appeals for the District of Columbia Circuit, in *Simon v. Republic of Iraq*, 529 F.3d 1187, 1193 (D.C. Cir. 2008), which found that after the passage of the NDAA federal courts retained jurisdiction to enter a judgment upon § 1605(a)(7) claims.

Additionally, jurisdiction to hear a § 1605(a)(7) claim, subsequent to the passage of the NDAA, rests upon a reservoir of jurisdiction found in § 1610(a)(7) and this *amicus* brief will demonstrate that in this reservoir the federal courts retain subject matter jurisdiction subsequent to the passage of the NDAA to hear pre NDAA § 1605(a)(7) cases.

Petitioners argue that NDAA repealed the jurisdiction of the federal courts to "hear" § 1605(a)(7) claims and effectively ended the power of the courts to hear Respondents' § 1605(a)(7) case. Petitioners argue inferentially that § 1605A and § 1605(a)(7) are mutually exclusive, that an aggrieved § 1605(a)(7) claimant has only the right to recycle the claim into a § 1605A claim after the passage of the NDAA, which would have the effect of ending the underlying § 1605(a)(7) litigation.

Petitioners argument is rebutted by the plain language of § 1610(a)(7). The source of Respondents' continuing post NDAA jurisdiction is found in the continuing jurisdiction to enforce a § 1605(a)(7) judgment, or any other judgment which "relates to a judgment for which the foreign state is not immune

under Section 1605A," embodied in § 1610(a)(7). An analysis of post judgment jurisdiction under the FSIA leads to the conclusion that the courthouse door is still open to § 1605(a)(7) claimants, based upon the fact that Congress granted the courts expansive jurisdiction to enforce a judgment under § 1610(a)(7) in the NDAA, as long as the judgment "relates" to a claim against a sovereign based upon § 1605A. This grant of jurisdiction to enforce is greater than the jurisdiction to "hear" cases under § 1605A. Congress therefore necessarily anticipated that NDAA would permit enforcement of judgments, outside the jurisdictional pillar of § 1605A. The gap between the power to hear and the power to enforce creates a reservoir of subject matter jurisdiction arising from the expanded power to enforce § 1605(a)(7) judgments under § 1610(a)(7).

Section 1610(a)(7) permits enforcement of a judgment if the judgment "relates" to a claim against a foreign sovereign who is not immune under § 1605A. This broad language starkly contrasts with § 1610(g)(1), which limits enforcement against agencies and instrumentalities to judgments "entered under Section 1605A." The expansive language used by Congress at § 1610(a)(7), rooted in the "relates to" phraseology, supports Respondents' argument that two classes of judgments, both § 1605(a)(7) and § 1605A judgments, would trigger or enable enforcement under § 1610(a)(7. Congress would have limited enforcement to judgments under § 1605A, but declined to do so. Congress clearly could have enacted this limitation in precluding post NDAA enforcement of a § 1605(a)(7) judgment, had Congress so expressed, but obviously declined to do so. *See Staples v. United States*, 511 U.S. 600, 620 (1994). This analysis further supports § 1610(a)(7) envisions enforceable judgments related but outside the jurisdictional timbers of § 1605A.

These enforceable § 1605(a)(7) judgments, related to claims under § 1605A, lead to the conclusion that Congress imbued the courts with jurisdiction to hear

these § 1605(a)(7) claims in the first place because Congress anticipated enforcement of both § 1605A and non § 1605A judgments under § 1610(a)(7). All valid federal judgments require a valid underlying jurisdictional component as a prerequisite, which would include both personal and subject matter jurisdiction. *Insurance Company of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). The ability of a federal court to enforce a judgment under § 1610(a)(7) presumes valid subject matter jurisdiction exists for the underlying claim.

In the post NDAA world, federal courts have the jurisdiction to enforce a judgment for a § 1605(a)(7) judgment, which is related to a claim under § 1605A as required by § 1610(a)(7). Congress likewise did not place any specific time limitations, or for that matter, any other restriction in a federal court's post NDAA jurisdiction in the enforcement of a judgment, other than as set forth by way of § 1610(a)(7). Given the breadth of § 1610(a)(7), the Court may enforce a § 1605(a)(7) judgment without limitation as to when that particularly judgment might have been rendered. As a § 1605(a)(7) judgment (or other non-tethered judgment) is enforceable in the post NDAA world regardless of the date of entry, this presumes that a jurisdictional reservoir exists in § 1610(a)(7) that sustains the ability of federal courts to adjudicate cases such as Respondents.

Petitioners might well counter that the jurisdiction of a federal court to enforce a judgment is limited to judgments under § 1605A, or pre NDAA § 1605(a)(7) judgments (such as *Peterson*). Congress clearly could have limited post judgment enforcement in the plain language of § 1610(a)(7) to these two specific classes of judgments (§ 1605A judgments and judgments rendered prior to NDAA), but chose not to do so and clearly left an undeniable gap between § 1605A claims to be "heard," and "claims to be enforced, under § 1610(a)(7). Congress is capable of expressing its intentions, *United States v. Rogers* 461 U.S. 677. 707-08 (1983), and

considering the extremely broad scope of § 1610(a)(7) a favorable inference may be drawn that Congress did not want to limit, define, or foreclose the enforcement of any type of claims which "relate . . ." to § 1605A or when such a judgment would be rendered, or the actual statutory basis. This would be consistent with the fact that NDAA is classically "remedial" and serves the purpose of aiding and assisting victims of the acts of state sponsors of terrorism, and therefore the court should interpret the statute liberally, all for the purpose of fulfilling the intention of Congress. *Reyton v. Rowe*, 391 U.S. 54 (1968).

The continuing validity of § 1605(a)(7) cases, such as Respondents, find its jurisdictional wellspring in the statutory reservoir of § 1610(a)(7). The post NDAA power to enforce a judgment reaches any judgment which "relates to a claim for which a foreign state is not immune under Section 1605A." 28 U.S.C. § 1610(a)(7) Post NDAA the power of the court to hear a claim against a foreign state, for a terrorist act, is found under § 1605A. The "power to enforce" exceeds the power to "hear." Section 1610(a)(7) therefore has created a reservoir of jurisdiction beyond § 1605A because non-tethered, but related § 1605A claims are enforceable. Section 1610(a)(7) does not limit this reservoir of jurisdiction by, for example, when the judgment arose, the statutory basis, the date of the underlying act, or any other qualifications.

CONCLUSION

WHEREFORE, *amicus curiae* respectfully requests that this Honorable Court find that the NDAA had no effect on the federal courts' jurisdiction to enforce § 1605(a)(7) judgments, such as *Peterson*, or to adjudicate § 1605(a)(7) cases pending at the time of the passage of the NDAA.

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No. 08-539

IN THE

Supreme Court of the United States

REPUBLIC OF IRAQ, *et al.*,

Petitioners,

v.

ROBERT SIMON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE ST. MARY'S UNIVERSITY SCHOOL OF LAW, CENTER FOR TERRORISM LAW, THE HONORABLE JOE SESTAK, MEMBER OF CONGRESS, AND DISTINGUISHED AMERICAN FORMER HIGH-LEVEL MILITARY OFFICIALS, AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether Congress intended, as evidenced in the text and legislative history of Section 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003 (EWSAA), to authorize the President to set aside the long-standing legislative framework transferring immunity decisions from the Department of State to the courts and to strip jurisdiction from ongoing POW and "human shield" cases against Iraq in Article III courts of the United States?

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This *amicus* brief is submitted on behalf of St. Mary's University School of Law, Center for Terrorism Law, The Honorable Joe Sestak, Member of Congress, and distinguished American former high-level military officials identified at Appendix A. These officials believe that the implications for national security of the United States of setting aside the obligations of Iraq toward tortured American Prisoners of War (POWs) and human shield victims, as is sought by Iraq in its argument to this Court, would be severe. Reversal of the decision of the Court of Appeals with respect to section 1503 would directly lead to enhanced torture of American service personnel held by the enemy in future wars and would undermine military morale and recruiting.[1]

The director of the St. Mary's University School of Law, Center for Terrorism Law (CTL), is Distinguished Professor of Law, Jeffrey F. Addicott, a former Army Judge Advocate (JAG), who served in senior legal positions for the Army JAG throughout the

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

world, and now specializes in national security law and terrorism law. CTL's mission is to examine current and potential legal issues related to terrorism in light of the challenge of achieving a proper balance between global security and civil justice.[2]

STATEMENT

The strength and spirit of America is personified in our military. Every U.S. conflict since Vietnam has been fought by an all-volunteer military and accompanying civilian force comprised of brave men and women who understand the inherent risks involved with being deployed for combat overseas. One of the most chilling risks associated with combat is the terrifying prospect of being held as a prisoner and tortured by enemy forces. Accordingly, it is imperative that the United States not waiver in its traditional leadership against torture of POWs.

Since the adoption of Article 56 of the Lieber Code[3] during the American Civil War, the United States has had a long-standing commitment to protecting POWs. Article 131 of the Third Geneva Convention mandates that no High Contracting Party may "absolve" a torturing State of "any liability" for grave breaches of the Convention, which includes the torture of POWs. *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1999, 6 U.S.T. 3316, 75

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[2] A list of the distinguished *amici* American former high level military officials is set forth in Appendix A.

[3] *See generally* R. S. Hartigan, *Lieber's Code and the Law of War* (1983).

U.N.T.S. 135 (1949). The United States, Iraq and every other nation in the world have ratified this Third Geneva Convention. Failure to observe this Convention would invite others to violate the law of war, undermining the United States' national security interests.

National security interests of the United States in this regard are clear. First, failing to protect the military and support personnel who defend the United States with their lives from torture and war crimes not only sets aside a clear mandate in the Third Geneva Convention, but would translate into the United States broadcasting to the world that the law of war is meaningless. As such, reversal of the Court of Appeals' decision concerning section 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003, Pub. L. No. 108-11, 117 Stat. 559 (EWSAA), would seriously undermine America's traditional leadership role in strongly opposing torture of POWs. This, in turn, would lessen the effectiveness of the United States in ongoing law of war negotiations and in seeking international compliance with the Geneva Conventions.

Second, setting aside a core deterrent mechanism in the Third Geneva Convention (Article 131) would directly enhance the risk of torture for American personnel who fall into the hands of the enemy. America has a debt of honor to its soldiers and civilians accompanying the military to espouse a steadfast policy to "never absolve a State of any liability" for the torture of POWs. Absolving Iraq of liability would set back the United States' vital goal of deterring terrorist acts against Americans and signal to every tyrant that America does not care if our POWs are tortured.

Third, the spectacle of the U.S. Government siding with the torturers of American POWs will harm military morale and undermine military recruiting efforts. Should this Court hold in favor of Iraq over the congressionally designated legal rights of American POWs tortured by Iraq the resulting national and international attention would severely harm military morale and military recruiting efforts. No greater request can the Nation ask of its military than to go into combat to protect our interests. In turn, the brave patriots who accept this challenge have a right to expect that their Nation will do all it can to fully support them against the specter of torture should they fall into the hands of an enemy who flagrantly violates the law of war.

SUMMARY OF ARGUMENT

Based on textual analysis and legislative history it is *clear* that the Congress of the United States did not seek to erase long-standing cases in U.S. courts against Iraq and absolve it of liability for its torture of American POWs during the 1991 Gulf War or civilians held as "human shields" during that War. Accordingly, this brief is devoted to setting out a complete textual and historical analysis of Section 1503 of EWSAA and its relevance to the Foreign Sovereign Immunities Act ("FSIA") 28 U.S.C. §§ 1602–1611 (2006). *No other brief before this Court includes this detail and, as such, this amicus brief is intended to supplement the analysis presented by the parties.* This analysis decisively shows that the Congress never intended to delegate to the President the Congress' Article III power over jurisdiction. Disturbingly, this analysis also shows that

the President drafted and submitted to Congress a clause to be included in an emergency supplemental appropriation bill for the Iraq War, told the Congress in writing that the clause was designed to provide authority to remove restrictions on foreign assistance to Iraq; and then, after passage of the clause, asserted that it gave him the authority to remove the jurisdiction of an Article III court and to set aside a long-standing legislative framework which transferred immunity decisions from the Department of State to the courts. The textual analysis and history which follow speak for themselves.

ARGUMENT

I. The Text of Section 1503 Has No Plain Meaning Applying to the FSIA, Jurisdiction, or Immunity. It Does Have Plain Meaning Applying to the Foreign Assistance Act.

A. The Broadest Textual Context.

This Court's task is to interpret the words of Section 1503 of EWSAA in their context and in light of the purposes Congress sought to serve. *See e.g., Tyler v. Cain*, 533 U.S. 656, 662 (2001) (in their context); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) (in light of the purposes Congress sought to serve). The clause in question, a short proviso to a general provision permitting the President to suspend application of the Iraq Sanctions Act reads: "Provided further, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to

countries that have supported terrorism." EWSAA § 1503. It should initially be noted that this proviso appears in a *textual context* under a heading "GENERAL PROVISIONS. THIS CHAPTER" concluding EWSAA's Chapter 5 that is itself titled "BILATERAL ECONOMIC ASSISTANCE FUNDS APPROPRIATED TO THE PRESIDENT United States Agency for International Development CHILD SURVIVAL AND HEALTH PROGRAMS FUND." In turn, this Chapter 5 appears in Title I entitled "WAR-RELATED APPROPRIATIONS," and the official title of the Act itself is "Emergency Wartime Supplemental Appropriations Act, 2003." Note that the clause does not appear in an act, title, chapter, or section of a chapter, that makes any reference to the FSIA, sovereign immunity, jurisdiction, judicial procedure, pending cases, torture, POWs, or Iraqi responsibility for torture of American POWs or human shield victims. Nor does its text reference any of these subjects.[4]

[4] The only reference in EWSAA to the judiciary is contained in a separate Chapter of Title I which merely provides additional appropriations for police enhancements and court security for three named courts, *not including* the District Court for the District of Columbia. See Title I, Chapter II of EWSAA.

B. The Primary and Secondary Meanings of "Or."

The first textual ambiguity is whether the short proviso in question means that the President can make irrelevant in the alternative *either* "section 620A of the Foreign Assistance Act of 1961" *or* "any other provision of law that applies to countries that have supported terrorism." Both dependent clauses are linked by the coordinating conjunction[5] "or" in the text; not by "and." The primary meaning of "or" is that it indicates an alternative choice; that is, it means not both.[6] Thus the

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[5] For the meaning of "coordinating conjunction" and "dependent clauses" see William A. Sabin, *The Gregg Reference Manual* (7th ed. 1994), at 471 (dependent clauses) and 472 (coordinating conjunctions).

[6] *See, e.g., The Concise Oxford Dictionary* (4th ed. 1951); *Random House Dictionary of the English Language* (Unabridged 1967); *Websters New World Dictionary of American English* (3d ed. 1988).

The *Random House Dictionary*, above, has the following definition of "or" at page 1011:

> **Or** . . . . *conj.* **1.** (used to connect words, phrases, or clauses representing alternatives): *to be or not to be.* **2.** (used to connect alternative terms for the same thing): *the Hawaiian or Sandwich Islands.* . . .

The significance of this order ranking of meanings, *e.g.*, 1 and 2 as above, is set out in the Guide to the Dictionary at *xxix* as "The most common part of speech is listed first, and the most frequently encountered meaning appears as the first definition for each part of speech." No meaning of "or" in the English language means "and."

(Cont'd)

primary *textual* meaning of this phrase is that the President could suspend either section 620A or any other provision of law that applies to countries that have supported terrorism. On May 7, 2003, Presidential Determination No. 2003-23 specifically made inapplicable section 620A. Under the primary textual meaning, the President would be unable to suspend any other provision of law. To avoid this primary textual meaning, the President's May 7 Determination simply rewrites the "or" in the text as "and," declaring: "I hereby . . . make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, Public Law 87-195, as amended (the 'FAA'), *and* any other provision of law that applies to countries that have supported terrorism" Pres. Deter. 2003-23, 68 Fed. Reg. 26549 (May 7, 2003) (emphasis added). *Amici* do not assert that this primary textual meaning is, in fact, the intent of Congress. However, the point is that to ascertain that intent properly and move beyond this *primary textual meaning* requires a review of the legislative history.

A second textual ambiguity relates to the scope of laws included within the second of the dependent clauses "any other provision of law that applies to countries that

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(Cont'd)

The *Random House Dictionary of the English Language* further defines "and", which does not include any of the meanings of "or." *Id.* at 55. And it defines "and/or" as a construction used to indicate that either "and" or "or" is appropriate for linking the words or phrases. Clearly "or" alone is not "and/or."

"Or" as a coordinating conjunction has no specialized legal meaning and does not appear in *Blacks Law Dictionary.*

have supported terrorism." The first point to note here is that if the coordinating conjunction "or" is not used in its primary sense (meaning "not both") then it is being used in its secondary sense, which is that of linking synonymous words or phrases or introducing an alternative on an equal footing with the preceding; that is, "botany, or the science of plants."[7] Under this textual interpretation of the phrase, the second dependent clause takes its meaning from the first. Since the first dependent clause of section 620A of the Foreign Assistance Act of 1961 is a provision restricting foreign assistance to terrorist States, then the meaning of the second dependent clause is also limited to provisions restricting foreign assistance to terrorist States, and preferably only provisions contained in the Foreign Assistance Act as is specifically named in the first dependent clause.[8] *Amici* believe that this textual meaning of the overall phrase is the better

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[7] *Id.*

[8] From legislative history one also sees another similarity between the content of the first and second dependent clauses. That is, the Administration told the Speaker of the House that the purpose of § 1503, in addition to setting aside the Iraq Sanctions Act, was to enable the President to make inapplicable three laws, all of which were provisions of Title 22, Chapter 32, as sections of the Foreign Assistance Act of 1961. No provision of Title 28 was identified. Thus, the laws identified by the Administration as the very purpose of § 1503, were, on both sides of the proviso, provisions of the Foreign Assistance Act of 1961. Indeed, Chapter 32 of Title 22 of the U.S. Code, in which all three of these identified laws reside, is itself entitled FOREIGN ASSISTANCE. That is certainly further evidence of the correct meaning of this proviso as linking equivalence.

interpretation of that phrase as reflected in the overall context and legislative history of this proviso. Certainly this plain *textual* meaning of the phrase does not include exclusion of jurisdiction from an Article III court over pending cases nor has anything to do with the liability of Iraq for the torture of American POWs or "human shield" victims. The FSIA, a provision of law relating to civil actions in the courts, is not a provision of law that relates to foreign assistance and is by no means a synonymous law with section 620A of the Foreign Assistance Act of 1961, nor is it contained in the Foreign Assistance Act.[9] As such, under this textual meaning neither the FSIA, nor jurisdiction of an Article III court, nor pending cases, nor immunity, nor Iraq's accountability for the torture of American POWs during

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[9] 22 U.S.C. 2151 (2006). Section 620A of the Foreign Assistance Act of 1961 also sets up a process for determination by the Secretary of State of governments supporting international terrorism and for rescinding such determinations or waiving prohibited assistance. In addition to not relating to foreign assistance, the FSIA, which relates to civil actions in the courts, contains no such provisions for determination or rescission of terrorist states nor provision for waiving prohibited foreign assistance. As such, it is not an equivalent or parallel law to § 620A in any way. Further, § 620A relates to determinations and rescission concerning *governments* supporting international terrorism while the FSIA, relates to *state* sponsors of terrorism. The difference here is crucial, since the FSIA, in § 1605(a)(7), makes it clear that the critical time for the designation of terrorism is at the time the act occurred for which one is bringing a civil action. Thus, the FSIA, which deals with *state liability that under national and international law transcends any particular government*, fully sanctions civil actions for past actions even after a change of government resulting in a removal of the terrorist designation.

the Gulf War are in any way implicated by this provision. The Presidential Determination simply rewrites the inconvenient "or" as "and," a word with a very different meaning than the precise language used by the Congress "or" as linking the dependent clauses. Interpretation of this full proviso by reading its two clauses together as having meaning linked by the coordinating conjunction "or" is also supported by long established canons of construction. "[U]nder the established interpretative canons of *noscitur a sociis* and *ejusdem generis*, [w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Wash. State Dept of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (internal quotations omitted)). Finally, in connection with this second textual ambiguity, it is evident that Iraq wants to treat the first dependent clause in the proviso, that is, the language "section 620A of the Foreign Assistance Act of 1961" as though it did not exist. A textual interpretation should be favored that gives meaning to *all* of the relevant language in construing dependent clauses.

C. The Scope of the Dependent Clause Issue.

A third textual ambiguity, relating to the scope of laws covered by the second dependent clause, is whether these laws are intended to be those which "only" apply to terrorist States, or are instead intended to include those which apply to terrorist and non-terrorist States, a virtually unlimited scope to draw from the full panoply

of the law of the United States. It should be noted here that sections 1605(a)(7) and 1610 of the FSIA, two of the three laws specifically invoked by the President in his May 22nd message, *do* apply to both terrorist and non-terrorist States. For under section 1605(a)(7) it is terrorist designation at the time the act occurred that is the critical date, and suits are fully sanctioned in such settings even after a terrorist designation is removed. *That is,* even if the President had complied with the detailed provisions of section 620A of the Foreign Assistance Act of 1961, in rescinding the terrorist designation of the Government of Iraq, actions would still lie against Iraq for the torture committed by that State at a time when it was so designated, even if it is no longer so designated.[10]

D. The Meaning of "Make Inapplicable."

A fourth textual ambiguity relates to the meaning of the cryptic phrase "make inapplicable" as used in the proviso. Does this mean that the laws in question may be changed for the future, as the tense suggests, *as though Iraq were no longer designated a terrorist*

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[10] Even more broadly, by seeking to include all of § 1610 of FSIA within the Presidential Determination, rather than simply those provisions of that section which apply at least some of the time to terrorist States, that is §§ 1610(a)(7), (b)(2) and (f)(2), the Executive has shown that it seeks to interpret § 1503 delegated authority to apply to *any* law affecting Iraq, whether or not that law has anything to do with countries that have supported terrorism. Thus, the Executive quite literally has interpreted § 1503 with respect to this third textual ambiguity in the broadest possible way, while continuing to maintain that the text of the proviso has only a single plain meaning.

State?[11] Or does it mean that Congress really intended to treat Iraq retroactively *as though it never were a terrorist State*? The first of these interpretations would not in any way affect the applicability of FSIA, which, as has been seen, provides that the critical date for terrorist designation is at the time the act occurred serving as the basis for the action. In this case, that means Iraq in 1991, under the tyrannical—and terrorist designated—rule of Saddam Hussein. This first interpretation would also seem supported by the natural forward looking meaning of the language "make inapplicable." The second interpretation, a retroactive meaning, which would be a necessary interpretation in order to absolve the past liability of Iraq while designated a terrorist state, would not at all seem a normal intent of Congress.[12] This interpretive issue, not

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[11] This would, for example, permit the Executive to treat the *de facto* setting without a government in Iraq as though the designation "terrorist" had been rescinded without the necessity of meeting the specific requirements for such rescission set out in 620A of the Foreign Assistance Act of 1961, including a variety of specific requirements concerning the state of the government of the country at a time when there was no government of Iraq. That would seem the principal purpose of this unclear phraseology.

[12] One example of the implausibility of the Government's position that Congress intended § 1503 to apply retroactively as though Iraq had *never been designated* a terrorist State, rather than a forward looking interpretation as though Iraq were *no longer designated* a terrorist State, is the absurdity of assuming that Congress intended to permit the President to set aside pending prosecutions against those who unlawfully

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resolved by any asserted plain meaning of the text, forces us to ask the real question with respect to this historic case. Is there a shred of evidence in the text or history of this proviso that the Congress sought retroactively to absolve Saddam Hussein and Iraq of liability for the brutal torture of American Gulf War POWs or "human shield" victims? This question answers itself. By ignoring this serious textual ambiguity, Iraq commits the common logical errors both of *petitio principii*, or question begging, and of a *non sequitur* when it first asserts that the language "make inapplicable" makes section 1605(a)(7) inapplicable to Iraq, and then that it follows that this removes subject-matter jurisdiction from pending cases. The first of these assertions illogically seeks to serve as its own proof, and the second simply does not logically follow from the first.[13]

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traded with Iraq prior to the liberation of that country. The traditional international law rule, which also reflects the official position of the United States, is that "States" remain liable for the actions of prior governments. Any other rule would severely harm stability in international relations.

[13] Yet another textual ambiguity inherent in the phrase "may make inapplicable" is whether the phrase authorizes the President to determine applicability law by law, or even case by case if the phrase is interpreted to apply to pending cases as Iraq asserts. This ambiguity, not resolved by the text itself, creates troubling issues of interference with "[t]he judicial Power of the United States." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217-18 (1995) (an effort to set aside the final judgment of an Article III Court by retroactive legislation held unconstitutional).

E. The Temporal Problem and the Sunset Clause

A fifth textual ambiguity is easily overlooked, because *it is rooted in the absence of text.* Thus, there is no text setting out the intent of Congress as to whether section 1503 is intended to authorize retroactive application or to authorize retroactive removal of jurisdiction of an Article III court in order to effectively absolve Iraq of liability for its torture of American POWs. Iraq is driven to arguing that the language "may make inapplicable" and the language "countries that have supported terrorism" somehow support its interpretation that section 1503 is intended to approve retroactive application. But to argue that the use of the present tense and signaling contingent future action (may make inapplicable) supports retroactive effect does not hold water. Nor does the use of the present perfect tense in the phrase "countries that have supported terrorism" help. This is simply a natural way of describing a class of countries which have been designated State sponsors of terrorism. Of course such countries can be so designated only after they *have supported terrorism.*

But the clause in question, however, and the proviso of which it is a part, do not at all address the question of temporal effect. If any temporal conclusion is to be drawn from the text of section 1503, it is that describing a contingent future event (may make inapplicable) signals future, not retroactive, effect.

Further, certainly the sunset provision in the broader textual context of section 1503 would also seem to counteract any argument that anything in that section was intended to apply to pending court cases. Clearly there is an absence of text in section 1503 specifically addressing

the temporal reach of whether any authorized action could operate retroactively, much less retroactively remove the jurisdiction of an Article III court.

In answering the above textual ambiguities it is relevant also to put the proviso in its broader *textual* context. That context is inclusion of the clause in question as a proviso to a section permitting the suspension of any provision of the Iraq Sanctions Act of 1990, as part of a chapter (five) dealing with "BILATERAL ECONOMIC ASSISTANCE," as part of a broader Title I of the Act dealing with "WAR-RELATED APPROPRIATIONS," and as part of an Act officially designated as the "Emergency Wartime Supplemental Appropriations Act, 2003." It should be noted that the Iraq Sanctions Act of 1990, the lead subject of section 1503, as with the Act, Title of the Act, Chapter of the Title, and Section of the Chapter, also contains no reference to the FSIA, jurisdiction, immunity, judicial procedure, or POWs, much less pending cases. Nothing in this context suggests any congressional intent to deal with these issues, much less to retroactively remove the jurisdiction of an Article III court and absolve Iraq of its liability for the brutal torture of American POWs or mistreatment of American "human shields."

Rather, the broader textual context supports the more natural interpretation of the phrase itself, that it was intended to permit removal of restrictions on foreign assistance to Iraq contained in sections of the Foreign Assistance Act. This latter interpretation is also supported by the text of the final proviso in section 1503 which sets a sunset date for the authorities contained within the section to expire. This sunset provision is perfectly consistent with continued congressional

control of foreign assistance, and temporarily waiving existing prohibitions on assistance to Iraq. But it does not make sense for Congress to intend to retroactively remove the jurisdiction of an Article III court and absolve Iraq of its liability for the torture of American POWs and then have the authority for this extraordinary action expire. Iraq's interpretation here would imply that section 1503 would operate retroactively to restore Iraq's sovereign immunity for all of its earlier terrorist actions and remove the jurisdiction of the courts over pending cases; and then on the sunset date it would abrogate that immunity anew. Iraq offers no explanation as to why Congress would legislate in such a peculiar fashion.

This Court has also held that a proviso should be interpreted in relation to its principal clause and the purpose that it serves within the statute as a whole. *See, e.g.*, *United States v. Morrow*, 266 U.S. 531, 534–35 (1925) (stating that grammatical and logical scope of a proviso is confined to "the subject-matter of the principal clause"). Here, the principal clause in section 1503, to which the proviso is appended, deals simply with suspending the application of the Iraq Sanctions Act of 1990, and the entire section simply deals with assistance to, and commercial transactions with, Iraq.

In short, Iraq's assertion that a "plain" or "manifest" meaning of the text of section 1503 of EWSAA compels its interpretation that Congress intended to retroactively remove the effect of the FSIA over pending actions against Iraq, including removing the jurisdiction of an Article III court and effectively absolving Iraq of its liability for the torture of American POWs and

mistreatment of American "human shields," is not supported by that text. What is supported as the compelling interpretation of that text is that Congress intended simply to permit removal of restrictions on foreign assistance to Iraq. This is the *only* interpretation consistent with the legislative history of section 1503. Perhaps that is why Iraq and the Executive virtually ignore the legislative history. But at least five issues in textual interpretation, any one of which would be fatal to Iraq's asserted plain meaning, require a broader review of context, including the text of EWSAA as a whole and the legislative history of section 1503 of that Act, in order to effectively interpret and carry out the intent of Congress.

Iraq and the Executive are, in their arguments, also inconsistent in their approach to statutory interpretation of section 1503. While they urge this Court that the text is manifest, and they studiously refrain from citing the legislative history which cuts against their interpretation, they urge interpretation of the section against a broad backdrop of presidential actions relating to Iraq.

II. The History of Section 1503 Does Not In Any Way Refer to the FSIA, Jurisdiction, or Immunity, but Rather Clearly Shows that This Section Was Intended to Permit Removal of Limitations on Assistance to Iraq.

A. Overall Legislative History of Section 1503.

As with the text of section 1503 of EWSAA, it should be noted at the outset that nothing in the legislative history of this section even mentions the FSIA, jurisdiction, immunity, the judiciary, judicial procedure, the courts, POWs, or Iraq's liability for torture of American POWs or human shield victims.

B. The President's Submission to Congress.

The genesis of what became this proviso in section 1503 is a presentation to the Congress from the Office of Management and Budget on March 25, 2003, submitted over a letter from the President to the Speaker of the House. The letter said with respect to the purpose of the President's request to the Congress:

> Today, I submit a request for 2003 supplemental appropriations to support Department of Defense operations in Iraq and to strengthen the capabilities of our friends and allies who will share the burden of military and stabilization activities. . . . I ask the Congress to appropriate the funds as

> requested, and promptly send the bill to me for signature.[14]

It would be hard to mistake that this was a request with respect to funding, not FSIA or the judiciary. Similarly, the OMB letter to the President, forwarding a detailed memorandum on the request, which was then sent with the President's letter to the Speaker, said as to the purpose of the submission:

> Submitted for your consideration are requests for FY 2003 supplemental appropriations that would provide funds to cover military operations, relief and reconstruction activities in Iraq, ongoing operations in the global war on terrorism, enhancements to the safety of U.S. diplomats and citizens abroad, support for U.S. allies critical to succeeding in the war, and homeland security protection and response measures.[15]

The purpose is supplemental appropriations, not the FSIA, the jurisdiction of the courts, immunity, or pending cases. None of these are mentioned in either

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[14] Letter from President George W. Bush to the Honorable J. Dennis Hastert, Speaker of the House of Representatives, at 1 (Mar. 25, 2003), *in* H.R. Doc. No. 108-55 at 1 (2003).

[15] Attachment to letter from Mitchell E. Daniels, Jr., the Director of the Office of Management and Budget to President George W. Bush, *conveyed on* March 25, 2003 to the Honorable J. Dennis Hastert, Speaker of the House of Representatives from President George W. Bush, *in* H.R. Doc. No. 108-55 at 3 (2003).

the President's letter to the Speaker or the Director's letter to the President, as is also true of the entire legislative history of section 1503. More specifically, the language which became section 1503 was submitted to the Speaker of the House as an attachment to the Director's letter. As it went to the Speaker it provided in relevant part as to recommended statutory language *and the purpose of that language*:

> Sec.____. *The Iraq Sanctions Act of 1990 is hereby repealed: Provided, That nothing in this section shall affect the applicability of the Iran-Iraq Arms Non-Proliferation Act of 1992 (Pub. L. 102-484): Provided further, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, as amended, or other provision of law that applies to countries that have supported terrorism: Provided further, That section 307 of the Foreign Assistance Act of 1961, as amended, shall not apply with respect to programs of international organizations for Iraq: Provided further, That provisions of law that purport to direct the United States Government to vote against or oppose loans or other uses of funds, including for financial or technical assistance, in international financial institutions for Iraq should not be construed as applying to Iraq.*
>
> This provision would repeal the Iraq Sanctions Act of 1990, which requires the President to continue an embargo on Iraq and

> impose certain mandatory sanctions against Iraq, including prohibitions on arms sales, certain exports, foreign assistance and Export-Import Bank Credits. It would also authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act.[16]

Once more, there is no reference to the FSIA, jurisdiction, immunity, the judiciary, the courts, POWs, or human shield victims, much less retroactive removal of jurisdiction over pending cases from an Article III court, either in the submitted language or the explanation as to its purpose.

This language became the basis for the language in the House bill that became section 1503 of EWSAA. As such, absent any indication to the contrary in the record as to a changed purpose of this language, the explanation of its purpose put forth by the Administration to the Congress is highly significant. The Administration's statement of purpose was clear: the language was intended to authorize the President to make inapplicable with respect to Iraq "section 620A, and section 620G, and section 307 of the Foreign Assistance Act," period. These sections of the Foreign Assistance Act deal with prohibitions on foreign

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[16] *See id.* at 26 ("GENERAL PROVISIONS" section of the Director's letter to the President of March, 25, 2003, conveyed to the Speaker, which set out specific recommended statutory language along with a description of the purpose of the language).

assistance. Section 620A (22 U.S.C. § 2371) is entitled "Prohibition on assistance to governments supporting international terrorism" and deals with broad prohibitions under a number of assistance laws if the Secretary of State determines that the government of that country has repeatedly provided support for acts of international terrorism. This section also sets up a detailed procedure for rescinding such determinations and for waiving prohibited assistance. Section 620G (22 U.S.C. § 2377), entitled "Prohibition on assistance to countries that aid terrorist states," provides for a withholding of assistance to governments which provide assistance to countries on the terror list. It furthermore provides a detailed procedure for waiving the prohibitions on foreign assistance imposed by the section. Finally, section 307 (22 U.S.C. § 2227), entitled "Withholding of United States proportionate share for certain programs of international organizations," establishes prohibitions on assistance from United States funds channeled through international organizations.

Consequently, all three of these sections, from Title 22, Chapter 32, Foreign Assistance, of the United States Code, deal with prohibitions on foreign assistance to terrorist governments. None deal with the FSIA, civil suits, jurisdiction, immunity, the judiciary, the courts, judicial procedure, POWs, human shields, or pending cases. Nor are any from Title 28, the judiciary title. And the lead purpose of the section, the Iraq Sanctions Act, deals with sanctions against Iraq and does not deal with the FSIA, jurisdiction, the judiciary, immunity, judicial procedure, the courts, POWs, or pending cases. The purpose of this language, as conveyed to the Speaker

of the House, was quite simply to permit the President to make inapplicable these provisions of the Foreign Assistance Act of 1961, prohibiting assistance to Iraq, directly, through third countries, or through international organizations.

C. The Reports of the Senate and House Appropriations Committees.

The Report of the Senate Committee on Appropriations on what became EWSAA explicitly confirms this meaning of the proviso—removing limitations on assistance for Iraq. It says, in the only reference to the authorities contained in this proviso: "The Committee provides the request for the repeal of the Iraqi Sanctions Act of 1990, *and other limitations on assistance for Iraq.*"[17] (Emphasis added.)

Similarly, the Report of the Committee on Appropriations of the House of Representatives notes the genesis of Section 1503 from the "authority requested by the President" and identifies it as authorizing "the President to make inapplicable with respect to Iraq section 620A and section 307 of the Foreign Assistance Act with respect to Iraq."[18] Further, a section at the end of the Report entitled "Changes in the Application of Existing Law,"[19] required by House rules, fails to mention any provision of FSIA or the

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[17] S. Rep. No. 108-33, at 21 (2003).

[18] H.R. Rep. No. 108-55, at 30 (2003).

[19] *Id.* at 44–48.

Judiciary Code despite expressly listing sections 620A and 307 of the Foreign Assistance Act and over four pages of other affected laws. The House Report further identifies the specific constitutional power to enact the proposed bill as "Clause 7 of Section 9 of Article 1 of the Constitution," stating that "[n]o money shall be drawn from the Treasury but in consequence of Appropriations made by law," signaling clearly that the House regards its actions as affecting appropriations.[20] There is no reference to Article III, the location of the power of Congress to strip the jurisdiction of the courts. It should also be noted that the House Report contains a section entitled "Salute to the Forces" that honors members of the armed forces.[21] It is absurd to believe that during an ongoing war that a Committee, which went out of its way to salute the forces, would vote 59-0 to authorize retroactive removal of the jurisdiction of the Article III courts over pending cases to hold Iraq accountable for its torture of American POWs.

D. The House/Senate Conference Report.

Again, the Conference Report cites merely the Iraq Sanctions Act and sections 620A and 307 of the Foreign Assistance Act as the relevant authorities in question providing in relevant part: "[t]he conference agreement, under section 1503, includes a provision similar to the House bill that would make inapplicable the Iraq Sanctions Act of 1990 and authorize the President to

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[20] *Id.* at 49. This, of course, is also evident from assignment of EWSAA to the House and Senate Appropriation Committees.

[21] *Id.* at 12.

make inapplicable with respect to Iraq section 620A and section 307 of the Foreign Assistance Act with respect to Iraq."[22] There is not the slightest indication in this Report that Congress intended to authorize the President to make inapplicable any part of FSIA much less retroactively remove the jurisdiction of an Article III court effectively absolving Iraq of its liability for the torture of American POWs or "human shield" victims.[23]

E. The Legislative Record Regarding the Judiciary.

There is in Title I of EWSAA a heading "THE JUDICIARY." This section contains only additional appropriations for three courts, not including the District Court for the District of Columbia, for the purpose of added police protection and security. If Congress intended to authorize removal of the

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[22] H.R. Rep. No. 108-76, at 76 (2003).

[23] Certainly one of the reasons for consulting legislative history with care is the concern that legislative history might be manufactured in committee reports or otherwise might not reflect the overall intent of the legislative body. Where, as here, the very point of consulting the legislative history is to demonstrate, through a complete absence of reference, that the issue was never considered by the Congress, other than to seek to implement a very different purpose conveyed to them in writing by the Executive, that concern is of little merit. Moreover, when the President drafts a clause for Congress and tells Congress in writing what it means, surely such history is of enormous importance as history permeating the entire process of legislative consideration.

jurisdiction of an Article III court over pending cases, surely such a provision would have been referenced in the only provision of EWSAA referencing the judiciary.

F. The Presidential Determination.

Finally, in reviewing the Presidential Determination of May 7, 2003, which the Government relies on as an exercise of any authority delegated to the President under section 1503, there is no mention of the FSIA, immunity, jurisdiction, the courts, the judiciary, judicial procedure, pending cases, POWs, or human shield victims, much less retroactive withdrawal of jurisdiction of an Article III court. Nor does it make any statement with respect to the scope of laws included within section 1503, or the meaning of "make inapplicable." *See* 68 Fed. Reg. 26549. Further, it does specifically cite the Iraq Sanctions Act with a level of specificity down to naming a specific section of that Act not affected, and section 620A of the Foreign Assistance Act of 1961, and, on both laws specifically identified, it even gives the full public law cite. *See id.* Moreover, the title of the Presidential Determination includes the phrase "Making Inapplicable Certain Statutory Provisions Relating to Iraq." *Id.* This implies identification of the affected statutory provisions, yet there is no mention of FSIA.

Since the Determination also rewrites the coordinating conjunction between the dependent clauses with an "and" instead of an "or," the Presidential Determination negates the Government's argument that section 1503 has a textual "plain meaning" supporting the Executive's interpretation. Finally, the FSIA was not mentioned by the Executive Branch—not in the

presidential submission of language to the Congress, not in the Presidential Determination itself, not in a dedicated or timely inclusion in the *Federal Register*, and not in any notice to Congress or the designated committees of Congress. Rather, it seems to have been an afterthought by the Administration for purposes of litigation when no plausible legal basis could be found to seek to set aside the POWs' historic judgment.[24]

G. Summary of the Legislative Record of Section 1503.

The history, as well as the text, is persuasive that the purpose of section 1503 was to permit expeditious removal of limitations on assistance to Iraq, as embodied in the Foreign Assistance Act. The presidential presentation to Congress specifies the purpose as permitting removal of limitations contained in three provisions of the Foreign Assistance Act, while specifying both the three provisions and the Act. The Senate Committee Report, House Committee Report, and Conference Report, citing both the provisions and the Act, speak either only of limitations on assistance, or name only specific provisions of the Foreign Assistance Act limiting assistance, as their only analysis of section 1503. Even if the text had a plain meaning, this level of clarity from the legislative record compels

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[24] Senators George Allen and Harry Reid objected to the "Administration's use of an emergency supplemental appropriations bill for purpose never intended or discussed with Congress." Letter from Senator George Allen to the Honorable John W. Snow, Secretary of the Treasury, of August 4, 2003; Letter from Senator Harry Reid to the Honorable Colin Powell, Secretary of State, of August 5, 2003. *See* App. B.

an interpretation that will follow the persuasive evidence as to purpose. As Justice Holmes wrote: "It is said that when the meaning of language is plain, we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928). *See also, e.g., Consumer Prod. Safety Commn v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Cal. Fed. Savs. & Loan Ass'n v. Guerra*, 479 U.S. 272, 284–85 (1987); *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 222 & n.20 (1981).

III. The Legislative History of FSIA Reflects an Important Interest in Judicial Determination of Civil Actions Against Foreign States and Nothing in Section 1503 Provides the Slightest Indication that Congress Sought to Abandon this Interest.

The purpose of the FSIA, enacted over a quarter of a century ago, was to transfer determinations about immunity from the State Department to the courts. Thus, the Congress provided in section 1602 of FSIA:

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice . . . . Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C. § 1602 (2006). The courts recognize the core purpose of FSIA was to remove immunity decisions from

the Executive to the courts, for decisions to be based on legal ground rather than political. Thus, as noted most recently in *Abrams v. Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173, 177–78 (2d Cir. 2003), *vacated and remanded*, 542 U.S. 901 (2004):

> As a result of these inadequacies [in pre-FSIA Executive Branch determinations concerning sovereign immunity] Congress in 1976 enacted the FSIA, a statute aimed to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to assure litigants that . . . decisions are made on purely legal grounds under procedures that insure due process." *Verlinden*, 461 U.S. at 488 (quoting H.R. Rep. No. 94-1487, at 7) (1976).

See also, e.g., Joo v. Japan, 332 F.3d 679, 686 (D.C. Cir. 2003).

There is not the slightest indication in either the text or legislative history of section 1503 of EWSAA that the Congress believed that it was reversing this long-standing congressional purpose much less that it was doing so retroactively for pending cases before the courts. Any reversal of this important congressional purpose should require explicit language and should not be inferred from general language enacted with absolutely no legislative or textual consideration of the issue. As the Supreme Court recently noted in *Whitman v. American Trucking Associations*, 531 U.S. 457, 468

(2001), "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."

IV. The Legislative History of Section 1605 of the FSIA and Related Provisions of Section 1610 of the FSIA Reflect an Important Congressional Determination to Permit Civil Suits Against States Designated as Terrorist States at the Time the Act in Question Occurred, and Nothing in Section 1503 Indicates that Congress Sought to Abandon this Interest.

For over a decade, the Congress and the Department of State have fought a running battle over permitting civil suits against States designated as terrorist States.[25] It is no accident that sections 1605(a)(7) and 1610 of the FSIA, the provisions sought to be "made inapplicable" by the Government, embody the core provisions disfavored by the Department of State in this ongoing

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[25] For an examination of why the State Department's view in opposing civil suits against terror States in their killing and torturing of Americans is old thinking, see John Norton Moore, *Introduction to Civil Litigation Against Terrorism* 3, 3–26 (John Norton Moore ed., 2004). As one beginning question, why should we shield terror States in our courts in settings in which the U.S. Government would be fully liable and subject to suit? And why, when we have for over a quarter century permitted suits against foreign States in our courts under FSIA for their contract and property violations, should we give them a pass for the killing and torturing of Americans in violation of the most widely adhered international agreements in the world?

struggle between the branches. Section 1605(a)(7) permits civil suits by American plaintiffs in certain settings following rejection by the State concerned of international arbitration of the dispute. Section 1610 permits recovery against the non-diplomatic commercial assets of that state in the United States. And Congress is aware that the critical date for the terrorist designation in these actions is the time the act occurred, or when the country is later designated as a terrorist State as a result of the terrorist act. FSIA § 1605(a)(7)(A). Moreover, when Congress amended the FSIA in 1996 to authorize these actions it expressly provided that its amendment "shall apply to any cause of action arising before, on, or after the date of enactment of this Act." 28 U.S.C. § 1605 (historical and statutory notes); *see also* Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. 105-277, 112 Stat. 2681-491 (employing similar language with respect to 28 U.S.C. § 1610 that made certain assets of terrorist States subject to execution and attachment in aid of execution). These clear temporal designations by Congress in relation to section 1605(a)(7) actions show that it has a specific, clearly expressed, intent that the critical date for terrorist designation in these actions is the time the act occurred that is the subject of suit. In this case that is 1990.

Given the vigorous struggle between the branches, it simply does not compute that Congress would have completely conceded its long-held position to the Executive without a single reference in the legislative record or any dissenting votes to the provision asserted by the Executive as having this effect. Is it a coincidence that the only three statutory provisions suddenly

discovered as an afterthought by the Executive on May 22nd, but never previously mentioned to Congress in the consideration of EWSAA, were the disputed sections 1605 and 1610 of the FSIA and section 201 of the TRIA?[26] The Executive's belated May 22nd reinterpretation of section 1503 is a deliberate attempt to prevail over what the Executive well knows to be the true intent of Congress. Surely, given the long-running battle between the Congress and the Executive about these actions, general language in an appropriation bill not mentioning the FSIA or the underlying issues in dispute should not be interpreted as applying to the FSIA. And even if it were, it should not be interpreted to override the specifically expressed congressional intent in the FSIA that the critical date for the terror designation is the time the act occurred so as to retroactively remove the jurisdiction of an Article III court.

V. A Supplemental Principle of Statutory Interpretation Concerning United States Adherence to Its Treaty Obligations Also Supports Affirmance.

Iraq has been held liable in the United States District Court for the torture of American POWs and this matter is still pending before the courts. Common Article 131 of the Geneva POW Convention, binding on both the United States and Iraq, provides: "No High Contracting Party shall be allowed to absolve itself or

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[26] The additional language of the May 22nd Message added only to the May 7th Presidential Determination that: "Such provisions of law that apply to countries that have supported terrorism include, but are not limited to, 28 U.S.C. 1605(a)(7), 28 U.S.C. 1610, and section 201 of TRIA."

any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave] breaches . . ." which includes torture of POWs. 6 U.S.T. 3316, art. 131. The Government, through its section 1503 argument seeks effectively to absolve Iraq of liability. Since the Convention is clear in saying that the parties cannot absolve another party *of any liability,* the Government is seeking an interpretation of an act of Congress to permit an action in violation of a solemn treaty obligation of the United States. An important principle of the foreign relations law of the United States is that "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987). This principle, known as the principle of the *Charming Betsy* case, was announced by Chief Justice Marshall in the early days of the Republic. In the words of Marshall, "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." *Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804).

The Government has sought in their previous arguments to rebut the power of this core principle of the foreign relations law of the United States by asserting that the POW Convention does not guarantee any particular forum. That is true, but irrelevant. Article 131 of the POW Convention sets out a general principle that prohibits absolving a torturing State of "any liability." If Iraq does not fear liability in United States courts, why has it brought this petition to the Supreme

Court seeking to wipe out its liability? The Convention is clear; a party to the treaty cannot absolve another party of *any liability* for the torture of POWs.

CONCLUSION

The judgments of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

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Vice Admiral (Ret.) James H. Doyle, Jr.,
United States Navy

Former Deputy Chief of Naval Operations
Former Commander, U.S. Third Fleet

Major General (Ret.) Alfred A. Valenzuela,
United States Army, Formerly Commander,
United States Army South, Deputy Commanding
General, United States Southern Command, and
Deputy Joint Task Force Panama Commander

Lieutenant General (Ret.) CJ Le Van,
United States Army
Former J3, Operations Branch,
Joint Chiefs of Staff

The Honorable Joe Sestak,
Member of Congress

No. 08-539

IN THE

Supreme Court of the United States

REPUBLIC OF IRAQ, *ET AL.*,

Petitioners,

v.

ROBERT SIMON, *ET AL.*,

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR TORTURED AMERICAN PRISONERS OF WAR AS AMICI CURIAE SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Whether a subsidiary clause of section 1503 of the EWSAA, which does not mention courts, jurisdiction or immunity, and which was drafted by the President and presented to the Congress with the written explanation that it would authorize the President to "make inapplicable" specified provisions of the Foreign Assistance Act, can instead be used by the President to strip the statutory jurisdiction of an Article III court?

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INTEREST OF TORTURED AMERICAN PRISONERS OF WAR

On April 4, 2002, seventeen American servicemen held as prisoners of war ("POWs") and tortured by Iraq during the 1991 Gulf War, and thirty-seven of their family members, filed suit in federal district court to hold their torturers accountable and to deter future torture of American POWs.[1] The Department of State served process on Iraq and the principal witness for the American POWs was the top law of war expert in the Army JAG Corps. As required by the Foreign Sovereign Immunities Act ("FSIA"), the case was brought only after Iraq refused to accept international arbitration. Liability of Iraq was then determined after a full review of the law and the facts by a federal judge, precisely as the law provides for claims brought against the United States under the Federal Tort Claims Act.

The American POWs who brought this case were tortured through brutal beatings, starvation, electric shock, whipping, burning, mock executions, threatened dismemberment, threats to their families, breaking of bones and eardrums, and horrifying genital inspections aimed at discrimination against Jews. For spouses and other family members, Iraq's refusal to permit notification of capture, its public statements about

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

POWs as human shields, and its coerced propaganda tapes of beaten POWs produced severe mental anguish. The plaintiff for whom their case takes its name, Marine Colonel (Ret.) Cliff Acree, endured one painful operation after another on his return because of his courageous refusal to criticize President George H.W. Bush to his Iraqi captors. The horrifying specifics for each of the POWs and family members are detailed in *Acree v. Republic of Iraq*, 271 F. Supp. 2d 179 (D.D.C. 2003).

In *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), the Court of Appeals ruled that the President lacked authority to strip the courts of jurisdiction, but overturned their judgment as lacking a cause of action, an issue not raised by the parties. While the *Acree* POWs sought *certiorari* to this Court, the Executive urged that the Court not grant *certiorari*, asserting as a reason the only argument it has ever made in court against the POWs and which is now presented to this Court—that the President was delegated authority by section 1503 of the EWSAA retroactively to remove the jurisdiction of the court which awarded their judgment. This Court declined *certiorari* in *Acree* (544 U.S. 1010 (2005)), thus declining to review the *sua sponte* dismissal of the POWs' case, based on a post-judgment decision in another case by the D.C. Circuit, and without remanding the case back to the District Court to review alternative causes of action pled by the POWs. After opposing *certiorari* in *Acree* where the section 1503 issue was presented, along with the unjust *sua sponte* dismissal by the Court of Appeals, the Government then supported *certiorari* in *Beaty*. Because the *Acree* case is still before the courts, the tortured American POWs

and family members will be directly affected by the decision of this Court and urge affirmance of the decisions below in *Beaty* and *Simon*.[2]

STATEMENT

The FSIA was enacted in 1976 to clarify United States practice concerning sovereign immunity. The law was principally jurisdictional, but it also made important substantive changes in scope of immunity, service of process, attachment, execution and other areas. Centrally, however, following severe criticism of State Department actions in deciding sovereign immunity on an *ex parte* basis, the FSIA was enacted to transfer determinations of immunity from the Executive to the courts. Henceforth decisions as to immunity would be made by the courts. There was no exception in the FSIA for the Executive to overrule judicial determinations. For over a quarter century a broad range of actions against foreign states have been permitted under the FSIA in United States courts. These actions are not "sanctions," but recognition that injured Americans deserve their day in court and a repudiation of politically motivated immunity decisions.

In 1996, Congress broadened the FSIA to include actions for torture and hostage taking committed against Americans, provided that the foreign state had been designated as a terrorist state at the time the act occurred. This broadening, specifically creating new statutory liability, was fought by the State

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[2] The *Acree amici* are listed at App. A.

Department which has continued to resist these terrorism actions despite Congress' will.[3]

The *Acree* case was brought under the FSIA. Counsel included Monroe Leigh, a former Legal Adviser to the Department of State, and John Norton Moore, a former Counselor on International Law to the Department who participated in drafting of the FSIA while serving as Counselor. Counsel quickly met with the Legal Advisers to both State and Defense and received no indication of opposition to the POWs' historic action to deter the torture of American POWs. Fifteen months later, however, after final judgment for the POWs and their family members, the Executive intervened seeking to erase their judgment. Subsequently, counsel learned through the media that certain legal officers within the Administration were authorizing controversial actions against detainees, creating a distorted dynamic.

On March 14, 2003, on the eve of the war with Iraq, twenty distinguished American national security officials wrote President Bush urging that it was in the United States' national security interest to add deterrence against torture of POWs and that the *Acree* case was "an historic opportunity that should not be lost." App. B. They thus urged the President to set aside an escrow from the blocked Iraqi assets to pay a judgment

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[3] For a history of this opposition, rooted in the State Department claims office, see J. N. Moore, *Civil Litigation Against Terrorism: Neglected Promise* (available from the Center for National Security Law, the University of Virginia 2009). *See also Civil Litigation Against Terrorism* (J.N. Moore ed., 2004).

for the POWs. This letter was signed by a former Chairman of the Joint Chiefs of Staff, a former Assistant to the President for National Security Affairs, two former Legal Advisers to the Department of State, and others. But while the Administration set aside over $100 million from the blocked assets to pay the judgments of civilians held as "human shields," nothing was set aside for the POWs.

The only *legal* argument the Executive has ever made against the POWs is that in section 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003 ("EWSAA") for the Iraq War, Congress delegated to the President the power retroactively to remove the jurisdiction of the court which awarded the POWs' judgment. This argument, as presented again to this Court, is a classic bait and switch on the Congress. The subsidiary clause of section 1503, which does not mention courts, jurisdiction, or immunity, had been drafted by the Executive who specifically told the Congress in writing that the clause would "authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act." Resp'ts' Opp'n Cert. 22a. The Executive then, belatedly, executed the switch and asserted in court that this clause permitted the Executive retroactively to remove the jurisdiction of the courts. This argument was rejected both by the District Court and the Court of Appeals in *Acree* and is now before this Court.

The only *policy* argument made by the Executive in its opposition to the POWs' judgment has been that the funds were needed for the "reconstruction of Iraq."

This argument rings hollow, however, as the Executive had already seized $1.7 billion in blocked Iraqi assets which had been earmarked by Congress to pay section 1605(a)(7) judgments, and it had issued an Executive Order blocking attachment of Iraqi assets. Nor will funds of Iraq be exposed to attachment or execution today by the decision of this Court. Moreover, the Executive worked with Iraq to settle approximately $19 billion in Saddam-era claims of foreign corporations against Iraq while simultaneously seeking to erase the POWs' judgment. Yet the POWs' claims against Iraq are the only claims guaranteed by treaty, binding on both the United States and Iraq. Article 131 of the Third Geneva Convention (the POW Convention) provides that no state may "absolve" a torturing state of "any liability" for the torture of POWs, a "grave breach" of the Convention.

Congress pushed back against the effort to erase the POWs' judgment. Thus, numerous members of Congress, on a bi-partisan basis, wrote the Administration urging support for the POWs' historic effort to hold their torturers accountable. Without dissent, the Senate adopted an amendment supporting the POWs. Subsequently, both houses of the Congress adopted section 1083(c) of the 2008 National Defense Authorization Act ("NDAA") which declared in a section entitled "PRESERVING THE JURISDICTION OF THE COURTS" that "Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code [the FSIA], or the removal of

the jurisdiction of any court of the United States." 122 Stat. at 343 (2008). This section further permitted the POWs to file a motion in United States District Court to restore their original judgment which had been set aside *sua sponte* by the Court of Appeals for the D.C. Circuit on the grounds that section 1605(a)(7) to the FSIA and the subsequent "Flatow Amendment" to that section had not created a federal statutory cause of action against a state. This Court of Appeals ruling was counter to the text and clear legislative history of that section and ignored counsel's repeated statements to the Court during oral argument that state law created an alternative basis for cause of action. The D.C. Circuit then dismissed the POWs' complaint despite the official view of the United States and this Court that state law is a basis for cause of action under the FSIA.[4] Nothing in section 1083(c) as put into the NDAA for the POWs would have permitted recovery against Iraqi assets. It would, however, have restored their judgment against Iraq, a matter which continues on appeal following the filing by the POWs of a 60(b) motion requesting a hearing on the cause of action issue. President Bush then exercised a hybrid veto against the NDAA until given a waiver authority against the entire section 1083 (the Lautenberg Amendment) with respect to Iraq. The Lautenberg Amendment, going beyond the 1083(c) provisions for the POWs, included provisions permitting execution against Iraqi bank assets.

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[4] *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. at 622 n.11 (1983); *Brief for Amicus Curiae the United States of America in Support of Plaintiffs-Appellees* in *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, No. 03-7117, at 11, 13 (May 14, 2004).

Following months of Executive inaction toward resolution of the POWs' claims, in September 2008, the House of Representatives, on a bi-partisan basis and without dissenting vote, adopted the Justice for Victims of Torture and Terrorism Act (H.R. 5167, 110th Cong. (Sept. 15, 2008)). The Act would have comprehensively resolved claims in United States courts against Iraq, including the Respondents', the "human shield" and the POW torture cases; thus giving teeth to the unanimous resolutions of the House and Senate warning Iraq during the 1991 Gulf War that it would be held accountable for torture of American POWs.[5] But in recognition of the new Government of Iraq the Act would have waived all punitive damages awarded by the courts as well as approximately two-thirds of compensatory damages. As such, the Act would have resolved virtually all valid claims against Iraq in U.S. courts for approximately $400 million. This Act, supported by the POWs, was cleared for the Senate consent calendar, but was then stopped by an anonymous hold.

After seeking to erase the cases against it in American courts (by urging President Bush to waive U.S. law), in June 2008, Iraq then filed an action in the Southern District of New York against 93 corporations seeking approximately $2 billion in damages under U.S. treble damage laws.[6]

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[5] *See, e.g.*, S. Con. Res. 8, 102d Cong. (as passed by Senate, Jan. 31, 1991) (condemning Iraq's violations of the Third Geneva Convention).

[6] *Republic of Iraq v. ABB AG*, Civ. Act. No. 5951 (S.D.N.Y. compl. filed June 27, 2008).

While past Executive practice has settled claims of Americans through claims settlement agreements, here the Executive sought to set aside the jurisdiction of the courts with respect to valid claims against Iraq without a claims settlement agreement. As such, there was no compensation to the claimants or provision for an alternative claims tribunal as in the 1980's agreement with Iran. Yet simultaneously the Administration was assisting settlement of over $19 billion in Saddam-era debts owed to foreign corporations such as Mitsubishi of Japan and Hyundai of Korea.

The national security claims asserted by Petitioners are misplaced; indeed upside down. Iraq has been settling billions in Saddam-era claims with foreign nations and corporations. It is an insult to national honor, a violation of Iraq's obligations under the Third Geneva Convention, and a security concern for America that Iraq seeks to absolve the claims of tortured American prisoners of war. As military experts have stated in *Acree,* absolving Iraq of liability can inhibit military recruitment, harm morale of our armed forces, and increase the risk that American POWs will be tortured. This Court was deceived by asserted security considerations in wartime presentation in the infamous *Korematsu* case. It should not be deceived again.

Repeated entreaties to the Executive and to Iraq to settle this case, including a plea by Judge Richard W. Roberts, produced not a single effort to move forward—only enhanced efforts to erase the POWs' historic judgment. Should the POWs' congressionally-affirmed action in the courts be dismissed there will be little incentive for Iraq ever to resolve these claims, or for

Iraq and the United States to adhere to their Third Geneva Convention obligation never to "absolve" a torturing state of "any liability" for torture of POWs. Most importantly, should the State Department succeed in its effort to erase the POWs' historic judgment for torture, and to set aside the United States' obligation under the Geneva Convention, it will increase the risk of torture for American service personnel held as POWs by the enemy, as their captors conclude from this sad episode that America does not care whether its POWs are tortured.

SUMMARY OF ARGUMENT

1. The power of Congress to strip jurisdiction from an Article III court is a power fundamentally affecting the independence of the judiciary. Jurisdiction stripping should never be assumed absent clear congressional intent. Here, however, there is no indication in the text of section 1503 of EWSAA, the text of EWSAA as a whole, or the legislative history of EWSAA, that Congress sought to strip the courts of jurisdiction with respect to long-standing cases against Iraq. To the contrary, section 1503 was drafted by the Executive and given to the Congress for inclusion in EWSAA, and the Executive told Congress in writing that the purpose of the clause was to "authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act." Resp'ts' Opp'n Cert. at 22a.

The text certainly has no plain or manifest meaning compelling an interpretation that it was intended to permit jurisdiction stripping. Indeed, the text is subject

to at least five preferable interpretations to that asserted by Petitioners, each of which would negate jurisdiction stripping.

The most reasonable of these purely textual interpretations is that found by the *Acree* Court of Appeals; that is, if the connecting "or" is not used in its primary sense as a disjunctive particle meaning "not both," then its second preferred meaning is as a conjunctive in which the textual interpretation of the second dependent clause takes its meaning from the first.

Further, the legislative history is conclusive that the purpose of section 1503 was to permit removal of limitations on assistance to Iraq, as embodied in the Foreign Assistance Act. Nor is the most important legislative history here simply a floor statement or committee report but rather history of greater significance. For it is history going to the core of congressional consideration; that is, the Executive as drafter of the provision told the Congress in writing when he presented the text to Congress that the purpose of the clause was to authorize the President to make inapplicable specifically designated provisions of the Foreign Assistance Act which would have limited funding for Iraq. Nowhere in the text or legislative record is there any mention of jurisdiction or immunity.

2. This case is *not* about the delegation principle. Rather, it presents a straightforward issue of statutory interpretation whether the Congress intended to include in any package of statutes the President was authorized to "make inapplicable" provisions of FSIA

removing jurisdiction from pending cases in United States courts. As such, arguments of Petitioners concerning deference to the President's foreign affairs power are misplaced. No such deference is due the President on the issue of what Congress intended—and particularly not when the issue is repeal of a fundamental statutory framework enacted for the very purpose of transferring immunity decisions from the Executive to the courts. But even if this Court were to conclude, against all textual and contextual evidence, that Congress so intended, the clause would be an unconstitutional delegation. For the clause, as so interpreted, would give the President unlimited discretion, for his own policy reasons, to strip the jurisdiction of Article III courts over long-standing claims against Iraq, or not, as he sees fit, absent any congressional direction to take the action, and not contingent on any future condition then unknown to the Congress. Petitioners' interpretation would also require that this Court accept, for the first time in its history, that Congress may turn over to the President its Article III responsibility for the statutory jurisdiction of the courts which textually refers not to a "power" of Congress as in Article I of the Constitution, but rather to specific action of "the Congress." As such, Petitioners' interpretation, if accepted, would violate Articles I and III of the Constitution.

3. Pursuant to the General Saving Statute, unless Congress *expressly* provides to the contrary, as it has not done in relation to section 1503, even the repeal of a statute does not "release or extinguish any . . . liability incurred under such statute . . . ." 1 U.S.C. § 109 (2006). This rule sets forth a general

purpose of Congress that can only be overcome by a subsequent expression of contrary purpose. The purported removal of any right to an FSIA action, without simultaneously offering another tribunal for resolving the rights of the parties, clearly sets aside mixed substantive and procedural rights of the parties under the FSIA and, as such, would be a violation of the General Saving Statute.

ARGUMENT

I. Congress Did Not Intend In Section 1503 Of EWSAA, Which Does Not Mention Courts, Jurisdiction, Or Immunity, To Delegate Authority To The President To Strip The Statutory Jurisdiction Of An Article III Court.[7]

Neither the text of section 1503, nor the broader text of EWSAA, nor the legislative history, supports Petitioners' assertion that Congress intended through this provision to delegate its Article III authority to the President to strip statutory jurisdiction from Article III courts with respect to long-standing cases against Iraq. The specific clause in question provides: "That the President may make inapplicable with respect to Iraq

[7] It is assumed that the issue being addressed by this Court is whether section 1503 stripped the jurisdiction of the courts with respect to Iraq and not with respect to the Iraqi Intelligence Service or any other entity of Iraq. As Judge Roberts concluded: "Neither the Act authorizing the Presidential Determination nor the Presidential Determination itself mentions Saddam Hussein or the Iraqi Intelligence Service either by name or by description." *See Acree v. Republic of Iraq*, 276 F. Supp. 2d 95, 101 (D.D.C. 2003), *rev'd*, 370 F.3d 41 (D.C. Cir. 2004).

section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism." 117 Stat. at 579 (2003).

There are at least five textually preferable interpretations of this text than that asserted by Petitioners. First, in its primary meaning the word "or" is a disjunctive particle that marks a choice "either this or that but not both." Petitioners cannot benefit from this textually preferred meaning because the President sought to "make inapplicable" laws on both sides of the "or."

Second, in its principal secondary meaning the word "or" is used to link synonymous words or phrases introducing an alternative on an equal footing; that is "mathematics or the science of numbers." Under this principal secondary meaning textual interpretation of the phrase following the "or" takes its meaning from the phrase before the "or." In this case, as held by the Court of Appeals in *Acree*, the phrase "any other provision of law" takes its meaning from "*the Foreign Assistance Act of 1961*." That is, the phrase following the "or" refers to provisions of "the Foreign Assistance Act" of the phrase before the "or"; not to the Judiciary Code where FSIA is located. Petitioners and the United States seek to avoid these principal meanings of the word "or" in the clause by simply seeking to have this Court ignore everything before the "or," to omit the word "other," and to rewrite the "or" as an "and." This is the "textual limitation" being urged on this Court. Pet'rs' Br. at 11, United States *amicus* at 9.

A third textual interpretation relates to whether the scope of the laws in the dependent clause relate *only* to those which apply to terrorist states, or to those which apply *both* to terrorist and non-terrorist states. Sections 1605(a)(7) and 1610 of the FSIA, as purportedly "made inapplicable" to Iraq by the President, do apply *both* to terrorist and non-terrorist states. For under section 1605(a)(7) it is the designation "*at the time the act occurred*" which is the determinative date. That is, these provisions of the FSIA also apply to states which were once terrorist states but are no longer. Under this third textual interpretation, if the correct interpretation is that it applies to laws which apply *only* to terrorist states then section 1605(a)(7) of the FSIA is not included. And if it applies to laws which apply to both terrorist and non-terrorist states, as does the FSIA, it would permit the President to set aside for Iraq virtually the entire U.S. Code.

Fourth, the phrase "make inapplicable" could mean, as the tense most reasonably suggests, to take action as though Iraq *were no longer designated a terrorist state.* That would seem the most reasonable textual interpretation from both the tense used and the context of the President's need to transition Iraq from terrorist to non-terrorist status. But under that interpretation, section 1605(a)(7) of the FSIA still applies in full without removal of immunity because the determinative date is when the act occurred, regardless of whether the state is subsequently taken off the terror list. The alternate interpretation here, which logically must be that of Petitioners and which strains credulity, is that "make inapplicable" means to take action as though Iraq *never were a terrorist state.* That is, are we to believe that

during the ongoing war to oust Saddam Hussein, the Congress sought to state that Iraq had *never* been a terrorist state?

Finally, textually, since nothing in section 1503 refers to "courts," "jurisdiction," "immunity," or "FSIA," this absence of text makes it evident that section 1503 can have no clear or plain meaning stripping the courts of jurisdiction for long-standing cases pending against Iraq under FSIA—issues which the text fails to name.

Similarly, the text of EWSAA itself lends support to an interpretation that this clause must be interpreted in relation to economic assistance and appropriations. Thus, the clause appears in a Chapter titled: "BILATERAL ECONOMIC ASSISTANCE FUNDS APPROPRIATED TO THE PRESIDENT," and this Chapter appears in Title I of EWSAA entitled "WAR-RELATED APPROPRIATIONS." Further, the official title of EWSAA is "EMERGENCY WARTIME SUPPLEMENTAL APPROPRIATIONS ACT, 2003." The clause does not appear in any act, title, chapter, or section that makes any reference in its full forty-four pages to the FSIA, immunity, jurisdiction, pending cases, or Iraq's responsibility to tortured American POWs and "human shield" victims.

When legislative history is examined, it is clear both from what the President told Congress the purpose of the language was that became section 1503 and from Committee and Conference Reports, that this section was intended simply to remove limitations on providing assistance to Iraq, as contained in the Foreign Assistance Act. Thus, the Executive told the Congress

in writing that this clause, which had been drafted by the Executive, would simply "authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act."[8] Like constitutional convention and ratification debates combined, the "history" here is uniquely strong in that the Executive told the Congress in writing prior to the adoption and approval process the precise purpose of the clause in question which he had drafted and sent to the Congress.

The Senate Appropriations Committee Report said of this section: "The Committee provides the request for the repeal of the Iraqi Sanctions Act of 1990, *and other limitations on assistance for Iraq.*"[9] Further, both the House Appropriations Committee Report and the House/Senate Conference Report specify only identified provisions of law that contain limitations on assistance and that are identified as sections of the Foreign Assistance Act. That is, *all indications in the legislative record as to the purpose of this particular section refer either to removing limitations on assistance, or removing specifically identified provisions of the Foreign Assistance Act.*

This Court has never upheld stripping of statutory jurisdiction through legislation that neither clearly refers to nor mentions courts, jurisdiction or the judiciary. The *amicus* brief for the United States makes

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[8] Resp'ts' Opp'n Cert. at 22a ("GENERAL PROVISIONS" section).

[9] S. Rep. No. 108-33, at 21 (2003) (emphasis added).

much of the argument that the use by Congress of more cabined legislation enacted two months before EWSAA shows that "Congress knows how to use more limited language . . . when it wants to." United States *amicus* at 13. But even more clearly, the Congress certainly knows how to use language of "courts" or "jurisdiction" when engaging in jurisdiction stripping. For over and over again it has done so when that has been its purpose. *See, e.g.*, *Ex parte McCardle*, 74 U.S. 506, 508 (1869) ("jurisdiction," "'judgment of the Circuit Court to the Supreme Court.'") (citation omitted); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 477 (1999) ("jurisdiction," "claims," "adjudicate cases," "'all past, pending, or future . . . proceedings'"); *INS v. St. Cyr*, 533 U.S. 289, 311 (2001) ("'no court shall have jurisdiction'," "'judicial review'"); *Calcano-Martinez v. INS*, 533 U.S. 348, 348 (2001) ("no court shall have jurisdiction" under 8 U.S.C. § 1252(c)); *Hamdan v. Rumsfeld*, 548 U.S. 557, 573 (2006) ("'no court, justice, or judge shall have jurisdiction'") (citation omitted); *Boumediene v. Bush*, 128 S. Ct. 2229, 2241 (2008) ("'no court, justice, or judge shall have jurisdiction'") (citation omitted).

Surely it is also relevant in seeking the intent of the Congress with respect to section 1503 that Congress subsequently enacted a provision, section 1083(c)(4) of the NDAA, which provides: "[n]othing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 . . . has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code [the FSIA], or the removal of the jurisdiction of any court of the United States." 122 Stat. at 343. While that

provision may have been "waived" for Iraq, it has not been repealed.[10] Nor has a single member of Congress ever espoused Petitioners' interpretation.

To shoehorn their interpretation of section 1503, Petitioners and the United States urge that FSIA is a "sanction." But the core purpose of FSIA is not as a sanction, but rather as a provision permitting injured Americans to have their day in court. The 1996 Amendments to the FSIA were not added to a terrorism sanctions law; indeed specifically they were not part of the Iraq Sanctions Act. Rather, they were placed in the FSIA, in the Judiciary section of the U.S. Code intended to permit suit and recovery by American citizens in U.S. courts. That is, section 1605(a)(7) of the FSIA, the applicable immunity provision, was enacted as a part of the FSIA, itself intended as a congressional rejection of the old pre-FSIA practice urged by Petitioners to this Court.

Statutory interpretation occurs in context. The relationship between laws is an important part of that context. And since the FSIA is directly implicated here, a core purpose of the FSIA is also relevant. That core purpose was to remove determinations about immunity from the State Department to the courts. Thus, Congress provided in section 1602 of the FSIA: "Claims of foreign states to immunity should henceforth be decided by the courts of the United States . . . in

[10] Nor has it been waived for the United States. This provision, then, must be applicable in determining whether the president of the *United States* was given jurisdiction-stripping authority by the Congress.

conformity with the principles set forth in this chapter." 28 U.S.C. § 1602 (2006). The United States cites *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945), the pre-FSIA high water mark of deference to the State Department concerning immunity. United States *amicus* at 19. But even then the degree of deference was a matter for this Court. The Court was not, in *Republic of Mexico*, accepting that the President could repeal a congressional enactment which had established jurisdiction and transferred immunity decisions from the President to the Congress, as has the FSIA. Importantly also, given the statutory framework of the FSIA as the sole basis governing immunity issues today, there is no evidence that the Congress intended to set that framework, a part of the Judiciary Code, aside.

Further, the FSIA has a built-in mechanism for transition from terror state status to non-terror status. Very simply, acts occurring after the transition are no longer covered, while those before the transition remain covered. Therefore Congress would not believe change was needed in FSIA for the Iraq transition. Nothing in the text or legislative history of section 1503 suggests that the Congress had any intent to reverse either FSIA's transfer of immunity decisions from the Executive to the courts, or FSIA's terror state transition provision.

The meaning of section 1503 as confined to removing limitations on foreign assistance perfectly squares *both* its precise text and its legislative history. *No other interpretation of that proviso* can square the text and its history. Surely, if one interpretation squares both the text and its history, in a setting where the text certainly

offers no plain meaning supporting the counter interpretation, it should be preferred over an interpretation that rewrites the text itself to substitute "and" for "or," is inconsistent with the legislative history and broader textual context of the section, *including specifically what the Executive told Congress the clause meant*, and that is broadly inconsistent with the thrust of a long-standing congressional effort to remove immunity determinations from the Executive.[11]

II. Were Section 1503 Interpreted As Petitioners Urge, It Would Be An Unconstitutional Delegation In Violation Of Articles I And III.

This case is *not* a delegation case. Rather, it presents a plain vanilla issue of statutory interpretation as to whether Congress intended to include in any package of statutes which the President was authorized to "make inapplicable," provisions of the FSIA removing jurisdiction from pending cases in United States courts. As such, arguments of Petitioners and the United States concerning deference to the President's foreign affairs

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[11] Immunity is determined as of the filing of an action, not throughout trial. As the United States argued in the *Jiang Zemin* case "questions of immunity from jurisdiction are to be determined as of the date that . . . [a] lawsuit was filed . . . ." Reply in Support of Motion to Vacate October 21, 2002 Order, in *Plaintiffs A,B v. Jiang Zemin & Falun Gong Control Office*, Civil Action No. 02 C 7530, at 1 n1 & 22 (N.D. Ill. 2003). *See also Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957); Fed. R. Civ. P. Rule 12(b). The original *Acree* action was filed on April 4, 2002. That action and any other action filed before the Presidential "Message" of May 22, 2003, thus could not be affected even by a removal of immunity.

power are misplaced. No deference should be accorded the President on the issue of whether Congress intended to authorize him to repeal a particular statute. Where, as here, the issue of statutory interpretation is whether Congress delegated authority at all to effectively repeal a statute there is, of course, no deference, for the issue is simply that of statutory interpretation, not presidential implementation of the statute[12] or exercise of the President's foreign affairs power. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).

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[12] There are, however, serious failures in presidential implementation of the statute. Thus, it was the President's "Message" of May 22nd, which as an afterthought first extended his "Determination" of May 7th to the FSIA. While the May 7th Determination was published in the *Federal Register*, the crucial "Message" of May 22nd (J.A. at AI) was itself apparently never published in the *Federal Register* despite its nature as a "substantive rule of general applicability" under section 522(a) of the Administrative Procedure Act. Further, the Executive has provided no evidence to any court that the four named committees of Congress, as required by the proviso to section 1503, were provided five days notice prior to either the President's "Determination" of May 7th, or his "Message" of May 22nd, that the President would assert authority under section 1503 to strip jurisdiction or affect "courts," "jurisdiction," "immunity," or "the FSIA". This was an important mechanism of congressional control built into EWSAA and failure to so notify the named committees of Congress should alone make any asserted jurisdiction stripping inapplicable. The specific prior notification requirement as a condition for exercise of 1503 authority provides: "That the President shall submit a notification 5 days prior to exercising any of the authorities described in this section to . . . [two committees specified in each House of the Congress.]." EWSAA § 1503, 117 Stat. at 579.

But were Petitioners' interpretation accepted, it would be an unconstitutional delegation. For the clause, as so interpreted, would give the President unlimited discretion, for his own policy reasons, effectively to repeal an indeterminate array of ill-defined statutes, or not–not contingent on any condition at the time the delegation was enacted, not mandating any duty of presidential action or inaction, and even permitting presidential removal, or not, of the statutory jurisdiction of an Article III court. As such, Petitioners' interpretation would violate Articles I and III of the Constitution and the important principle of separation of powers so central to our constitutional democracy. Moreover, a core purpose of nondelegation doctrine is presented here—that is to protect the constitutional lawmaking authority of the Congress. This purpose is singularly relevant for a clause drafted by the Executive, presented to Congress in writing for one purpose, and then asserted, after congressional enactment and during ongoing litigation, as providing authority to remove the statutory jurisdiction of an Article III court, an entirely different purpose.

As the Court stated in *Clinton v. City of New York*, 524 U.S. 417, 439-40 (1998), quoting its earlier decision in *INS v. Chadha*, 462 U.S. 919, 951 (1983), "power to enact statutes may only be 'exercised in accord with a single, finely wrought and exhaustively considered, procedure.'" *Id.* And again quoting *Chadha*: "'[R]epeal of statutes, no less than enactment, must conform with Art. I.'" 524 U.S. at 438 (citation omitted). And "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Id.* Or, as the Court stated in *Youngstown Sheet & Tube Co.*

v. Sawyer, 343 U.S. 579, 587 (1952), "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Id.*

This Court in *Clinton*, drawing heavily on its earlier decision in *Field v. Clark*, 143 U.S. 649 (1892), a foreign affairs case concerning the President's authority to suspend exemptions under the Tariff Act of 1890 on occurrence of certain conditions, set out a three-part test for determining a constitutional delegation to the President that will not violate Article I of the Constitution. *First*, the presidential exercise must be contingent upon a condition that did not exist at the time the purported delegation was enacted; *second*, the President must have a duty to act when the condition occurs; and *third*, when the President acts he must be "executing the policy that Congress had embodied in the statute." 524 U.S. at 444. The Court clearly rejected any "[a]ct [that] gives the President the unilateral power to change the text of duly enacted statutes." *Id.* at 447. In basing its analysis on the *Field* case, the Court developed its three-part test despite *Field*, as a tariff matter, being a case impacting the foreign affairs arena. *Id.* at 444-45. In discussing *Field*, while the Court recognized a greater degree of discretion for the President in foreign affairs, the Court pointedly noted: "*More important*, when enacting the statutes discussed in *Field*, Congress itself made the decision to suspend or repeal the particular provisions at issue upon the occurrence of particular events subsequent to enactment, and it left only the determination of whether such events occurred up to the President." *Id.* at 445. And in an opinion authored by Justice Scalia, in which

Justices O'Connor and Breyer joined, the Justices "acknowledge[d] that the limits . . . [on reduction or repeal of statutes] may be much more severe [than on augmentation of statutes through substantive rulemaking]." *Id.* at 465 (Scalia, J., dissenting, *and* O'Connor, J. *and* Breyer, J. joins as to Part III, concurring in part and dissenting in part).

Section 1503 of EWSAA, if interpreted as Petitioners assert, would be a paradigmatic violation of Article I and the principle of separation of powers embodied in the nondelegation doctrine. The purported power to repeal portions of a duly enacted statute—indeed to repeal portions of an unidentified number of unidentified statutes—*fails all three of the Clinton requirements* for a constitutional delegation.

First, the purported authority is not contingent upon an identified condition that did not exist when EWSAA was passed. Indeed, the authority is contingent upon no condition at all. Further, EWSAA was passed during the Iraq War, and Petitioners have suggested nothing not known to the Congress or the President at the time of its passage which subsequently became known only three weeks later at the time of the Presidential Determination. In fact, the President told the Congress the purpose of the clause *before* it was passed, without identifying any condition to be ascertained then or later as a condition of exercise. That is, there is no reason the Congress itself could not have specified the laws to be "made inapplicable" at the time EWSAA was passed, rather than delegating authority to the President, acting only three weeks later.

Second, the authority purportedly delegated to the President under Petitioners' interpretation embodies no duty on the President to act or not act if the identified condition occurs. Rather, the President is free, for his own policy reasons, to make inapplicable *or not*, as he sees fit, an unidentified number of unidentified statutes. The language of the clause is "may make inapplicable." Certainly there is no duty on the President to be exercised pursuant to an identified contingent event.

Third, given the complete absence of any congressionally identified contingent event, and the complete absence of any identified duty on the President with respect to such contingent event, the President would not be "executing the policy that Congress had embodied in the statute," but rather relying on his own policy judgment. *See Clinton*, 524 U.S. at 444. Indeed, when President Bush did belatedly seek to repeal provisions of the FSIA, he was not carrying out any policy that the Congress had embodied in EWSAA. To the contrary, he sought to take advantage of the perceived opportunity to gain victory in a long-running battle between the Congress and the State Department about civil actions against terror states.

In short, the purported delegation is not cabined by any policy guidance to control the potentially vast discretion to repeal an unidentified universe of laws. The clause fits perfectly the Court's description of an unconstitutional act as one that "gives the President the unilateral power to change the text of duly enacted statutes." *Id.* at 447. Further, the delegation is a setting of repeal or reduction of a fundamental statutory

framework rather than one of augmentation or rulemaking, and thus would receive higher scrutiny. *See id.* at 464-65.

The purported delegation would even fail the constitutional test for congressional delegation to agencies, as set out by this Court in *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001). In *Whitman*, the Court said: "we repeatedly have said that when Congress confers decision making authority upon agencies *Congress* must 'lay down by legislative act an *intelligible principle* to which the person or body authorized to [act] is *directed* to conform.'" *Id.* at 472 (emphasis added) (alteration in original) (citation omitted). Here, section 1503 neither lays down an *intelligible principle* nor is there any *direction* to the President to conform, but instead only an open-ended invitation to pursue presidential policy as though mandated by Congress.

Further, this case unmistakably presents nondelegation concerns rather than *Chevron* special deference. For here the Executive seeks to set aside a statutory framework enacted by Congress; that statutory framework was for the very purpose of transferring authority from the Executive to the courts and ending a much criticized Executive practice; the action sought is repeal rather than augmentation of law; it is not pursuant to any rulemaking authority; it would set aside a self-executing treaty obligation of the United States in the Third Geneva Convention; there is no evidence of any deliberative process in extension to the FSIA in the "Message" of May 22nd; there is apparent non-compliance with congressionally established

reporting and publication mandates; it presents issues of potential abuse in that it was drafted by the Executive, was interpreted in a litigating posture to support the Executive's view in a struggle it had lost with the Congress, and was aimed at on-going litigation in which the Executive had an interest; it presents a vital issue for rule of law of retroactive removal of jurisdiction over pending cases; and it raises serious constitutional and structural problems concerning the role of Congress and the independence of the judiciary.[13]

Nor does this case present expertise uniquely in the province of the President. The purpose identified by the President as the reason for the clause merely identified the need to remove restrictions on foreign assistance to Iraq. As an appropriations matter, this is hardly within the core of the Executive's foreign affairs power. And as this clause is sought to be exercised against American POWs and "human shield" victims, it is specifically a case concerning FSIA and the jurisdiction of courts in Washington D.C., not combat operations in Iraq or even implementation of a claims settlement agreement.

Further, this asserted delegation of jurisdiction-stripping power violates the authority of the Congress

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[13] *See* W. N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 Geo. L.J. 1083, 1092 (2008); Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 Yale L.J. 1230 (2007) ("law-interpreting authority at some point effectively constitutes law-breaking authority.") (abstract).

under Article III of the Constitution. It is established law that Congress may set the jurisdiction of certain Article III courts. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868). But it is equally clear that any removal of jurisdiction is subject to the limitations of the Constitution, including separation of powers. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

Congress has given the Executive neither a letter of text nor a word of history purporting to delegate authority to remove the jurisdiction of an Article III court. But even if Congress had clearly sought to delegate this authority, Congress' authority to remove the statutory jurisdiction of an Article III court, as set out in Article III, Sections 1 and 2, may not be delegated. The language of Article III, Sections 1 and 2, of the Constitution is clear; it is "*Congress may from time to time ordain and establish*" inferior Article III Courts (Section 1), and it is "Exceptions" and "Regulations" "*as the Congress shall make*" with respect to the jurisdiction of the Supreme Court (Section 2). This language is in contrast to the use of the phrase "Congress shall have power" in dealing with the usual legislative ager da of Congress as this language appears repeatedly in Article I, Section 8, and Amendments XIII, XIV, XV, XVI, XIX, XXIII, XXIV, and XXVI of the Constitution, and even Article III, Section 3, in declaring "Punishment of Treason."

The usual congressional delegation risks blending legislative and executive powers. But delegation to the Executive to strip jurisdiction of an Article III court risks blending legislative, executive, and judicial powers. Congressional delegation to the Executive is itself under close scrutiny, as the *Clinton* decision shows, but routine

rulemaking delegations involving filling in the interstices of the law, while running the risk of blending legislative and executive functions, are far less intrusive of separation of powers than a delegation of authority to the President to remove jurisdiction from an Article III court in a pending case. Moreover, a particularly dangerous feature of the *McCardle* doctrine is that the Congress may have power to shut down a pending case before the courts by interfering with its continuing jurisdiction when the Congress does not like the way a case is going. Delegating this power to the President would substantially enhance this risk, particularly as we see here after the President waits fifteen months to see the outcome in *Acree*. Surely *McCardle* should not be extended to an uncabined delegation to the President, as Petitioners seek.

It is relevant in this connection to note the recent analysis by Justice Breyer, joined by Justices O'Connor and Scalia, in dissenting in *Clinton v. City of New York*, 524 U.S. 417, 469, 480 (1998), in which the Justices note:

> There are three relevant separation-of-powers questions here: (1) Has Congress given the President the wrong kind of power, *i.e.*, "non-Executive" power? (2) Has Congress given the President the power to "encroach" upon Congress' own constitutionally reserved territory? (3) Has Congress given the President too much power, violating the doctrine of "nondelegation?"

Id. at 480 (Breyer, J., dissenting, *with* O'Connor, J. *and* Scalia, J., join as to Part III, dissenting). While the last

of these questions is engaged in the merits of a *Clinton* delegation analysis, the second of these is precisely the point here: Congress has the sole power to remove jurisdiction of Article III Courts. As the Court said in *Cary v. Curtis*, 44 U.S. (3 How.) 236, 244-45 (1845), it is the Congress "who possess the sole power" over jurisdiction in inferior tribunals.

In addition to encroaching on congressional prerogative, the Executive action, delaying fifteen months to ascertain the outcome of the *Acree* case before first asserting its jurisdiction-stripping argument, also encroaches on judicial prerogative. In *Klein*, the Supreme Court struck down a law of the reconstruction Congress which sought to offset the effect of Executive pardons by purportedly terminating jurisdiction of the courts. The Court held in part that the effort unconstitutionally encroached on the President's pardon power, but the Court also noted: "[T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end." 80 U.S. (13 Wall.) at 145. And, again, the Court noted: "What is this but to prescribe a rule for the decision of a cause in a particular way?" *Id.* at 146.

III. The General Saving Statute Prohibits The Removal of Jurisdiction In These Circumstances Absent An Express Provision To Extinguish Liability.

Pursuant to the General Saving Statute, 1 U.S.C. § 109 (2006), unless Congress *expressly* provides to the contrary, as it has not remotely done in relation to FSIA here, even the repeal of a statute does not "release or

extinguish any . . . liability incurred under such statute . . . ." *Id.* This long-standing congressional policy embodies a principle of fair dealing and protection of stability of expectations concerning operation of the judicial system. By this provision Congress itself has adopted the rule that unless a statute *expressly* provides to the contrary, the repeal of a statute does not release any liability incurred under the repealed statute, or affect enforcement of such liability with respect to an action pending at the time of the repeal. The General Saving Statute provides in relevant part:

> The repeal of any statute shall not have the effect to release or extinguish any . . . liability incurred under such statute, unless the repealing Act shall *so expressly provide*, and *such statute shall be treated as still remaining in force for the purpose of sustaining any proper action* . . . for the enforcement of such . . . liability.

Id. (emphasis added). This rule sets forth a general purpose of Congress that can only be overcome by a subsequent expression of contrary purpose.

When in 1947 Congress passed a Resolution repealing in general terms a large body of war powers and the Executive contended that it removed jurisdiction of the District Court over a pending case with regard to liability of the United States under the War Risk Insurance Act, this Court held that the General Saving Statute embodied a principle of fair dealing that not only saved from extinction a liability incurred but also saved the statute itself for purposes of enforcement

of the liability. *De La Rama S.S. Co. v. United States*, 344 U.S. 386, 389 (1953). Mr. Justice Frankfurter, writing for the Court, applied the General Saving Statute to a pending case that had not yet even gone to trial at the time of the repeal. The Court said in language (and context) closely paralleling the present case that "[i]n repealing the War Risk Insurance Act among numerous other statutes, Congress was concerned not with jurisdiction . . . . [i]t was concerned with terminating war powers after the 'shooting war' had terminated." *Id.* at 391. Mr. Justice Frankfurter also noted that the Saving Statute embodies a principle of fair dealing and the "'statute shall be treated as still remaining in force. . . .'" *Id.* at 389 (citation omitted). And, in an apt description of the modern 1996 anti-terror amendments to the FSIA as embodied in Sections 1605(a)(7) and 1610, he spoke of statutes which embody "fused components of the expression of a policy." 344 U.S. at 390.

Five years after the decision in *De La Rama Steamship*, this Court again was faced with a repeal of jurisdiction case in *Bruner v. United States*, 343 U.S. 112 (1952). This was a case in which Congress had clearly withdrawn jurisdiction (a preexisting statutory provision denying jurisdiction was broadened by changing officers to officers or employees) and the Court determined that in the case of a clear withdrawal of jurisdiction, the withdrawal would apply to pending cases. Importantly, however, the Court also considered the General Saving Statute but concluded that the jurisdictional change had "not altered the nature or validity of petitioner's rights or the Government's liability but . . . simply reduced the number of tribunals authorized to hear and determine such rights and

liabilities." *Id.* at 117. The clear implication is that had the repeal involved a setting of mixed substantive and procedural rights, as in *De La Rama Steamship* and as under the FSIA, or had the repeal removed all tribunals for determining the liabilities, as is also true here where the FSIA provides the sole tribunal available to the parties, that the Court would have applied the General Saving Statute to prevent that result.

Clearly, Iraq has a statutory "liability" under section 1605(a)(7) of the FSIA which may not be waived absent an "express" statutory provision to that effect from the Congress, and thus, under the General Saving Statute, the FSIA remains in force whatever the interpretation of section 1605.

More recently, the General Saving Statute was applied by the Court of Appeals in the District of Columbia Circuit to the issue of governmental immunity from tort liability in *Keener v. Washington Metropolitan Area Transit Authority*, 800 F.2d 1173 (D.C. Cir. 1986). In *Keener*, the Court of Appeals said "the repeal of the 1928 Act did not result in a forfeiture of the remedies available at the time of repeal for injuries incurred prior to repeal . . . ." *Id.* at 1179.

CONCLUSION

The judgments of the Court of Appeals should be affirmed.

Respectfully submitted,

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Counsel for Amici Curiae
824 Flordon Drive
Charlottesville, Virginia 22901
(703) 216-3387 (T)
(434) 977-2749 (F)

APPENDIX A — LIST OF AMICI

Amici are the plaintiffs in *Acree v. Republic of Iraq*, Civil Action No. 02-632 (D.D.C.):

Colonel, USMC (Ret.) Clifford Acree,

Lieutenant Colonel, USMC (Ret.) Craig Berryman,

Former Staff Sergeant, US Army, Troy Dunlap (no longer on active duty),

Colonel, USAF (Ret.) David Eberly,

Lieutenant Colonel, USAF (Ret.) Jeffrey D. Fox,

CWO-5, USMC (Ret.) Guy Hunter,

Sergeant, US Army David Lockett,

Colonel, USAF H. Michael Roberts,

Colonel, USMC Russell Sanborn,

Captain, USN (Ret.) Lawrence Randolph Slade,

Major, USMC (Ret.) Joseph Small,

Staff Sergeant, US Army (Ret.) Daniel Stamaris,

Lieutenant Colonel, Air National Guard Richard Dale Storr,

Lieutenant Colonel, USAF Robert Sweet,

Lieutenant Colonel, USAF (Ret.) Jeffrey Tice,

Former Lieutenant, USN Robert Wetzel (no longer on active duty),

Former Commander, USN Jeffrey Zaun (no longer on active duty),

Cynthia Acree,

Leigh Berryman,

Gail Stubblefield,

Appendix A

Ronald Dunlap,
Barbara Eberly,
Timm Eberly,
Dr. Robert Fox,
Terrence Fox,
Patricia Borden,
Nancy Gundersen,
Timothy Fox,
Mary Hunter,
Laura Hunter,
William (Ray) Hunter,
Mary Elizabeth (Lily) Hunter,
Patricia Roberts,
Starr Barton,
Anna Slade,
Leanne Small,
David Storr,
Douglas Storr,
Diane Storr,
Arthur Sweet,
Mary Ann Sweet,
Michael Sweet,
Jacqueline Wetzel,
William Wetzel,
James Wetzel,
Edward Wetzel,
Margaret Wetzel,

Appendix A

Paul Wetzel,
Kathleen Farber,
Anne Kohlbecker,
Sally Devin,
Calvin Zaun,
Marjorie Zaun, and
Linda Zaun Lesniak.

APPENDIX B — LETTER OF MARCH 14, 2003 TO THE HONORABLE GEORGE W. BUSH FROM TWENTY DISTINGUISHED FORMER HIGH-LEVEL NATIONAL SECURITY OFFICIALS OF THE UNITED STATES

The Honorable George W. Bush
President of the United States
The White House
Washington, D.C.

Dear Mr. President:

We write to you as former public servants who have served their Nation in the national security process of this great country. We believe you have a unique opportunity for America to send a powerful message that the torture of American POWs will not be tolerated.

American POWs have been brutally tortured in war after war. While our government has tried to deal with this horror, there have been few options realistically available to us to add deterrence against it. Indeed, some of us have wrestled with precisely this challenge while in office. Now, however, thanks to the courageous action of 17 American former Gulf War POWs brutally tortured by Iraq, and 37 of their family members, we have a unique opportunity to establish an historic precedent that Nations which torture American POWs will be held accountable. Last year these brave Americans brought suit against Iraq in United States District Court and, following a non-appearance by Iraq, an entry of default was entered on September 25, 2002. Their case will go to the equivalent of a bench trial before a federal district judge on March 31 of this year. Under current law, these

Appendix B

American POWs and their family members will be able to enforce any final judgment obtained against the substantial Iraqi blocked assets in the United States.

This would truly be one of the first serious efforts to add deterrence against the torture of American POWs. We believe that this is an historic opportunity that should not be lost. It is time now to establish the principle that we will not return blocked assets of a former enemy state absent full accountability for that state's liability in the torture of American POWs. In this case, that means that no blocked assets of Iraq should be returned to that country until provision has been made for the full payment of any court judgment.

In the event that Iraq refuses to disarm, and war and the inevitable American victory comes, some will urge you to seek legislation to return all blocked assets for the future reconstruction of Iraq, thus overturning current law permitting the POWs to enforce any judgment against the blocked Iraqi assets. We understand the importance in such circumstances of American assistance in bringing about a stable new government in Iraq rooted in the rule of law. That objective should not come, however, at the cost of failing to hold Iraq responsible for its torture of American POWs. The responsibility for torture of American POWs must be regarded by the United States, as it is set out in Article 131 of the POW Convention, as a non-absolvable responsibility of the Contracting State itself. Moreover, it would be simply unthinkable to ask the American POWs tortured by Iraq to bear the cost of the reconstruction of Iraq.

Appendix B

Never before has an American President had such an opportunity to strike a blow against the torture of our POWs. This is truly a unique opportunity to send a signal to all future tyrants that America values the rule of law and that we will hold nations that torture American POWs accountable.

Dick Cheney, as then-Secretary of Defense, and Mrs. Cheney, and Colin Powell, as then-Chairman of the Joint Chiefs of Staff, as well as Mrs. Powell, personally welcomed these American heroes back from their brutal captivity in Iraq. A decade later, let us embrace these brave Americans in their historic effort to say "never again" to such brutal treatment of our service personnel.

Thank you for your consideration.

Sincerely,

DISTINGUISHED AMERICANS APPENDING THEIR NAMES TO THIS LETTER

Governor Bill Richardson
former United States Ambassador to the United Nations

Ambassador Max M. Kampelman
Chairman Emeritus of the American Academy of Diplomacy, Georgetown University Institute for the Study of Diplomacy & Freedom House

Appendix B

The Honorable Anthony Lake
former Assistant to the President for
National Security Affairs

The Honorable John Lehman
member of the 9/11 Commission &
former Secretary of the Navy

Ambassador Ronald F. Lehman
former Assistant Secretary of Defense for
International Security Policy & Director of the
United States Arms Control
and Disarmament Agency

Admiral Thomas H. Moorer, U.S.N. (Ret.)
former Chairman of the Joint Chiefs of Staff

Admiral Paul A. Yost, Jr. U.S.C.G. (Ret.)
Commandant of the United States Coast Guard
(1986-1990)

Davis R. Robinson
former Legal Adviser to the
U.S. Department of State

Abraham D. Sofaer
former Legal Adviser to the
U.S. Department of State

Ambassador Richard Schifter
former Assistant Secretary of State
for Human Rights and Humanitarian Affairs

Appendix B

Ambassador Mark Palmer
former Deputy Assistant Secretary of State
and Ambassador to Hungary

Ambassador W. Nathaniel Howell
former U.S. Ambassador to the
State of Kuwait

Ambassador David C. Jordan
Professor of Government and Foreign Affairs
& former U.S. Ambassador to Peru

Vice Admiral James H. Doyle, Jr. U.S.N. (Ret.)
former Deputy Chief of Naval Operations

Major General John K. Singlaub U.S.A. (Ret.)
former Chief of Staff, U.S. Forces, Korea

Lieutenant General CJ Le Van U.S.A. (Ret.)
former J3, Operations Branch, Joint Chiefs of Staff

Rear Admiral Horace B. Robertson, Jr. U.S.N. (Ret.)
Professor (Emeritus) Duke University School of Law
& former Judge Advocate General of the Navy

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Professor of Law & former Counselor on
International Law to the Department of State

Jerome J. Shestack
Past President of the American Bar Association

Appendix B

Michael P. Malloy, Ph.D.
former Special Assistant for Foreign Assets Control
United States Department of the Treasury

cc: The Honorable Dick Cheney, Vice President of the United States The Honorable Colin Powell, Secretary of State

Nos. 07-1090 and 08-539

In the Supreme Court of the United States

REPUBLIC OF IRAQ, *PETITIONER*,

v.

JORDAN BEATY, ET AL., *RESPONDENTS*.

REPUBLIC OF IRAQ, *PETITIONER*,

v.

ROBERT SIMON, ET AL., *RESPONDENTS*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR *AMICI CURIAE* JAMES S. VINE, *ET AL.* IN SUPPORT OF RESPONDENTS IN 08-539

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INTEREST OF THE *AMICI CURIAE*

Amici curiae, James S. Vine, *et al.*,[1] are 201 American citizens who are plaintiffs in *Vine v. Republic of Iraq* No. 01-02674 (D.D.C.), a suit that was originally filed on December 27, 2001, as a class action against the Republic of Iraq ("Iraq") for money damages resulting from acts of hostage taking and false imprisonment.[2] The *Vine* plaintiffs were held in Iraq and Kuwait following the Iraqi invasion on August 2, 1990, when former Iraqi President Saddam Hussein issued an order detaining all American citizens present in those countries in order to extract a commitment from the United States and its coalition allies to refrain from using military force to liberate Kuwait.

Many of the *Vine* plaintiffs were rounded up by Iraqi security forces and forcibly relocated to strategic sites, where they were used as "human shields" to prevent allied air attack. Other *Vine* plaintiffs fled to various diplomatic properties in Iraq and/or Kuwait, where they were confined throughout the crisis. Still others hid themselves in "safehouses" and private residences for fear of being captured by Iraqi security forces, who they believed would either execute them or force them to serve as "human shields." All of the *Vine* plaintiffs endured harsh conditions throughout their detention, lived in constant fear for their lives and suffered severe emotional distress. Many witnessed unimaginable atrocities. Others were beaten, raped, tortured and/or subjected to mock executions.

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[1] A complete list of the *Vine* plaintiff *amici* is set forth in Appendix A.

[2] The parties have consented to the filing of this brief.

The interest of the *Vine* plaintiffs in the resolution of these matters could not be greater. Indeed, upon motion of the *Vine* plaintiffs, the district court consolidated their case with both *Seyam v. Republic of Iraq*, No. 03-00888 (the plaintiffs in which are members of the putative class in *Vine*) and *Simon v. Republic of Iraq*, 03-00691, for purposes of resolving Iraq's motion to dismiss. The district court then issued a single consolidated decision in which it granted Iraq's motion in the *Seyam* and *Simon* cases, but denied it in the *Vine* case. In other words, the district court decision that the D.C. Circuit affirmed and that is a subject of the present *writs of certiorari* is as much a decision in the *Vine* case as it is in two of the three cases that are covered by those *writs*. However, because the *Vine* plaintiffs had the "misfortune" to have prevailed in the district court—and because Iraq made a tactical decision to forego its appellate rights—the *Vine* plaintiffs have been denied the opportunity to appear before this Court as parties and to argue their cause.

The *Vine* plaintiffs' inability to participate in this proceeding is particularly distressing because the arguments that they believe are the most compelling are not highlighted in Respondents' brief, and have received little or no attention from either Iraq or the United States. Given these unusual circumstances, the *Vine* plaintiffs respectfully request that this Court give their brief *amici curiae* the same degree of consideration that it would if they were appearing as parties before it.

PROCEDURAL HISTORY OF THE *VINE* CASE

The *Vine* plaintiffs filed their original complaint against Iraq on December 27, 2001, invoking the district court's jurisdiction under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* (the "FSIA"), which permits American citizens to bring actions against terrorist states for certain acts of terrorism, including hostage-taking. 28 U.S.C. § 1605(a)(7).[3] In accordance with the requirements of the FSIA, 28 U.S.C. § 1608(e), the *Vine* plaintiffs effectuated service of their complaint upon Iraq on November 25, 2002.

Following the entry of an order of default against Iraq on August 18, 2003, the United States filed a statement of interest in the *Vine* case, arguing that jurisdiction over Iraq had not existed since May 7, 2003, when the President issued a determination, declaring that all "provision[s] of law that appl[y] to countries that have supported terrorism" were inapplicable with respect to Iraq. Presidential

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[3] *Vine* was filed as a case related to *Hill v. Republic of Iraq*, Case No. 99-3346 (D.D.C.), an action that had been filed two years before and that was prosecuted on behalf of 180 other plaintiffs who had been victims of Iraq's hostage-taking in the wake of its invasion of Kuwait. In that action, the district court ruled that each of the plaintiffs had established his or her claim to relief by satisfactory evidence and issued them default judgments that totaled approximately $94 million. *See Hill v. Republic of Iraq*, 175 F. Supp. 2d 36 (D.D.C. 2001), *rev'd in part on other grounds*, 328 F.3d 680 (D.C. Cir. 2003). These judgments were collected in full in March 2003, when President George W. Bush instructed the Secretary of Treasury to issue a license instructing the Bank of New York to pay the judgment out of blocked Iraqi accounts.

Determination No. 2003-23, 68 Fed. Reg. 26,459 (May 16, 2003). In issuing this determination, the United State argued, the President was acting pursuant to authorities delegated to him under the second proviso of Section 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003 (the "EWSAA"), which provides that:

> the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism.

Pub. L. No. 108-011, § 1503, 117 Stat. 559.

While the issue was still being pending in the district court, the D.C. Circuit held in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), that Section 1503 of the EEWSA was not intended to give the President the authority to exempt Iraq from the exception to immunity set forth in Section 1605(a)(7) of the FSIA. In an order, dated July 20, 2004, the district court ruled that the *Acree* decision foreclosed the United States' jurisdictional argument.

Subsequently, in January 2005, Iraq appeared in the *Vine* case, which the district court then consolidated with the *Seyam* and *Simon* cases for purposes of resolving Iraq's motion to dismiss. That motion sought dismissal on a variety of grounds, including that plaintiffs' claims were all barred by the statute of limitations, that they had failed to state a viable cause of action, that their claims presented a non-justiciable political question, and

that the President's exercise of his supposed authority under Section 1503 of the EWSAA had divested the court of jurisdiction over Iraq.

On September 7, 2006, the district court issued its decision on Iraq's motion to dismiss, in which it denied that motion as to the claims of the *Vine* plaintiffs, but granted it as to the claims of the *Seyam* and *Simon* plaintiffs on statute of limitations grounds. *Vine v. Republic of Iraq*, 459 F. Supp. 2d 10 (D.D.C. 2006). Although Iraq filed a notice of appeal from the order denying its motion to dismiss the *Vine* case, Iraq ultimately moved to dismiss that appeal and the D.C. Circuit obliged. *Vine v. Republic of Iraq*, 2006 U.S. App. LEXIS 30400 (D.C. Cir. Dec. 11, 2006).

While Iraq was filing its appeal in the *Vine* case, the *Seyam* and *Simon* plaintiffs filed a notice of appeal of the decision dismissing their claims. In an opinion issued on June 24, 2008, the Court of Appeal reversed the district court's ruling that the *Seyam* and *Simon* cases were time-barred, rejected Iraq's argument that a Presidential waiver under Section 1083(d) of the National Defense Authorization Act of 2008, Pub. L. No. 110-181, 122 Stat. 3 (the "NDAA"), stripped the district courts of jurisdiction to hear pending claims against Iraq under Section 1605(a)(7) of the FSIA, and adhered to the *Acree* court's ruling that Section 1503 of the EWSAA also did not give the President the authority to deprive the courts of jurisdiction over such claims. *Simon v. Republic of Iraq*, 529 F.3d 1187 (D.C. Cir. 2008).

On January 9, 2009, this Court granted Iraq's petition for *certiorari* to address the issues whether jurisdiction continues to exist over Iraq in light of the exercise of Presidential authorities under Section 1083(d) of the NDAA and Section 1503 of the EWSAA.[4]

SUMMARY OF THE ARGUMENT

In their opinions in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), both Judge Edwards, writing for the majority, and Chief Justice Roberts, in a concurring opinion, found the meaning of Section 1503 of the EEWSA to be less than pellucid and the question whether that section's second proviso gave the President the authority to exempt Iraq from the jurisdictional grant contained in Section 1605(a)(7) of the FSIA to be a close one. *Id.* at 51 and 62. This Court, however, need not struggle trying to answer that question.

The legal landscape surrounding the jurisdictional issue in this case has dramatically changed since the D.C. Circuit issued its decision in the *Acree* case on June 4, 2004. At that time, the authorities contained in Section 1503 were in full force and effect. However, Section 1503 contains its own sunset provision, which, by its terms, provides that "the authorities contained in this section" (including the authority to declare "provision[s] of

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[4] This brief does not address the issue whether Section 1083(d) of the NDAA deprives the district courts of jurisdiction over Iraq. For the reasons set forth in Respondents' merits brief and the United States' *amicus* brief, the *Vine* plaintiffs agree that it does not have that effect.

law that appl[y] to countries that have supported terrorism" inapplicable to Iraq) "shall *expire* on September 30, 2004" unless extended by a subsequent congressional enactment. Pub. L. No. 108-011, § 1503, 117 Stat. 559, 579 (emphasis added). While Congress temporarily extended the sunset date by one year in November 2003, Pub. L. No. 108-106, § 2204(2), 117 Stat. 1230, it has granted no further extension and, hence, the authorities contained in Section 1503 lapsed on September 30, 2005.

While the *Acree* panel disagreed on the issue whether Section 1503 authorized the President to limit the jurisdictional grant contained in Section 1605(a)(7) of the FSIA, all three of the *Acree* judges agreed on what would happen upon the expiration of Section 1503's sunset period—that is, they agreed that jurisdiction over Iraq would be restored upon the triggering of its sunset provision. 370 F.3d at 57 and 62. As that provision became effective some three and one half years ago, Section 1605(a)(7) has applied to Iraq ever since.

The United States' argues that this passing of the sunset is of no moment because the President's exercise of his authority to exempt Iraq from laws applicable to terrorist countries has "a *permanent* effect." (United States *Amicus* Brief at 19 (emphasis in original.) It is wrong. First, the proposition that delegated authorities can somehow outlast the statute that is the source of such delegation is totally devoid of support and conflicts with elementary principles of administrative law.

Second, the United States' view regarding the temporal scope of Section 1503's second proviso cannot be squared with its admission that the authorities contained in that section's fourth and fifth provisos, which likewise, make certain provisions of law inapplicable to Iraq, expired with the passing of the sunset on September 30, 2005. As there is no relevant distinction between the language of these two provisos and the language of the second proviso, the United States' interpretation runs afoul of the basic canon of construction that requires identical words used in the same statute to be given the same meaning.

The failure to apply that rule in this case carries dangerous and absurd policy consequences that Congress could not possibly have intended. Under the United States' interpretation of Section 1503, the President permanently exempted Iraq from any and all provisions of law applicable to terrorist states. Furthermore, since all of the authorities that Section 1503 granted the President expired on September 30, 2005, he no longer has any implied power to undo Iraq's exemption from those provisions. Thus, in the unfortunate event that insurgent forces were to take power in Iraq and launch terrorist attacks against U.S. interests around the world, the President would be powerless to take immediate action. Rather, he would have to wait for Congress to pass a new statute making applicable to Iraq all of the provisions of law that President Bush supposedly made permanently inapplicable to that country some six years ago.

If, as would be the case under the United States' interpretation of Section 1503, the only way to re-apply all of these provisions of law to Iraq would be for Congress to enact new legislation withdrawing Iraq's exemption, then the power the Congress delegated to the President in that section was, in effect, the power to amend the law. There is, however, "no provision in the Constitution that authorizes the President to . . . amend . . . statutes." *Clinton v. New York*, 524 U.S. 417, 438 (1998). Where, as here, a proffered interpretation of a statutory provision would present a serious separation of powers problem, that interpretation should be avoided if there is any other plausible way of construing that provision.

A construction of Section 1503's second proviso under which the Presidential authorities contained in that proviso would lapse on its sunset date is more than just plausible. That provision was an emergency measure, the manifest purpose of which was to enable the President to remove the barriers to aiding and trading with Iraq that had been imposed as a result of its designation as a terrorist state. Such authority was needed only until such time as conditions on the ground in Iraq would allow the Secretary of State to certify that its new leadership had provided credible assurances that Iraq would henceforth abide by the rule of law, thereby, enabling him to rescind Iraq's designation as a state-sponsor of terrorism. 22 U.S.C. § 2371(c). Thus, Section 1503 of the EEWSA is best construed as an *interim measure*, which gave the President the authorities he needed to exempt Iraq from provisions of law applicable to countries that have supported

terrorism for the limited period of time specified in its sunset provision.

Even assuming that jurisdiction over Iraq was not restored when the authorities contained in Section 1503 expired, the argument that Section 1503 authorized the President to make Section 1605(a)(7) of the FSIA inapplicable to Iraq overlooks the cardinal rule of statutory construction that disfavors implied amendments and repeals. Consistent with this rule, which is not mentioned in either of the opinions in *Acree*, this Court has repeatedly held that a legislative intention to repeal or amend a prior statute will be found only where such intention is "clear and manifest." As Chief Justice Roberts acknowledged in his concurring opinion in *Acree*, Section 1503's second proviso does not constitute an unequivocal congressional command to limit jurisdiction under Section 1605(a)(7) of the FSIA. 370 F.3d at 62. Accordingly, it cannot be construed as having that effect.

ARGUMENT

In their haste to be rid of these cases, Iraq and the United States seek to manipulate the meaning of nineteen words in a proviso to a wartime appropriations bill, which was enacted by Congress on an emergency basis and without debate. To this end, they construe those words as impliedly amending the FSIA, so as to give Iraq a *permanent* exemption from its jurisdictional grant in cases involving acts of state-sponsored terrorism. It is, however, the task of this Court to interpret the words of the EWSAA not as if they existed "in a

vacuum," but rather in the "context" of that statute as a whole, *Tyler v. Cain*, 533 U.S. 656, 662 (2001), and "in light of the purposes, Congress sought to serve." *Chapman v. Houston Rights Welfare Org.*, 441 U.S. 600, 608 (1979); *see also Holloway v. United States*, 526 U.S. 1, 6 (1999) (stating that basic principle of construction mandates that courts "'consider not only the bare meaning' of the critical word or phrase 'but also its placement and purpose in the statutory scheme'").

The EWSAA was enacted on April 16, 2003 in the immediate aftermath of the fall of Baghdad to coalition forces. Pub. L. No. 108-011, 117 Stat. 559. The manifest purpose of that statute was to meet Iraq's urgent need for foreign assistance and to enable private relief organizations and businesses to help in the rebuilding effort. These objectives could not be achieved, however, without removing the barriers to aid and commerce that had been imposed on Iraq by virtue of the former regime's support for international terrorism. As set forth in greater detail in Respondents' brief, the removal of these barriers—and not any desire to forever deprive American victims of Iraqi terrorism of their right to a judicial forum—was the sole concern of the language in Section 1503 of the EWSAA authorizing the President to exempt Iraq from "Section 620A of the Foreign Assistance Act or any other provision of law" applicable to terrorist states. *See* S. Rep. No. 108-33, at 21 (2003) (noting that section 1503 responded to the President's "request for the repeal of the Iraqi Sanctions Act of 1990 [sic], and *other limitations on assistance for Iraq*") (emphasis added).

I. Any Authority The EWSAA May Have Bestowed Upon The President To Exempt Iraq From Section 1605(a)(7) Of The FSIA Expired On September 30, 2005.

In addressing whether the district courts have jurisdiction to entertain these actions, both Iraq and the United States devote almost their entire argument to the proposition that Section 1503 of the EEWSA was intended to give the President the authority to make Section 1605(a)(7) of the FSIA "inapplicable to Iraq." This Court, however, need not—and should not—address this question of statutory interpretation because any authority the EEWSA may have given the President to immunize Iraq from the jurisdiction of U.S. courts lapsed on September 30, 2005.

A. Congress Clearly Intended That All Of The Authorities Contained In Section 1503 Of The EEWSA, Including Any Authority To Exempt Iraq From The Jurisdictional Grant Contained In Section 1605(a)(7) Of The FSIA, Would Lapse Upon The Date Specified In The Sunset Provision.

Section 1503 of the EWSAA contains a sunset provision, which expressly states that "the authorities contained in this section" (including, of course, the authority to declare "provision[s] of law that appl[y] to countries that have supported terrorism" inapplicable to Iraq):

> shall *expire* on September 30, 2004, or on the date of enactment of a subsequent Act

> authorizing assistance for Iraq and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first.

Pub. L. No. 108-011, § 1503, 117 Stat. 559, 579 (emphasis added).

On November 6, 2003, Congress amended Section 1503 of the EWSAA to extend the authorities in that provision for an additional year. *See* Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, Pub. L. No. 108-106, § 2204(2), 117 Stat. 1230 (the "ESAADRIA"). However, at no time since that amendment has Congress enacted any additional amendment extending the authorities in Section 1503 of the EWSAA beyond September 30, 2005. Thus, even if the President had the authority to make Section 1605(a)(7) of the FSIA inapplicable to Iraq when Congress enacted the EWSAA in April 2003, that authority expired on September 30, 2005 and, hence, Section 1605(a)(7) has been applicable to Iraq ever since. *See Acree v. Republic of Iraq*, 370 F.3d 41, 57 (D.C. Cir. 2004) (noting that expiration of Section 1503's sunset provision would operate to make Section 1605(a)(7) of the FSIA "available as a basis of jurisdiction" against Iraq in any action "based on events that occurred while Iraq was designated as a state sponsor of terrorism").

The temporal limits that the EWSAA imposed on the authorities contained in Section 1503 reflect the temporary nature of the problem those authorities were addressing. As set forth above, the problem

was that Iraq's designation as a state sponsor of terrorism had triggered various provisions of law that would prevent assistance to and restrict trade with that country. It was temporary because the Secretary of State had the authority to rescind that designation upon his certification that the new leaders of Iraq, whoever they might be and whenever they came to power, had provided credible assurances that Iraq would henceforth abide by the rule of law. 22 U.S.C. § 2371(c). But, as the uncertain conditions then prevailing in Iraq would make it impossible for the Secretary to make that certification for some time, Congress had to adopt *an interim measure* to prevent Iraq's designation as a terrorist state from blocking the effort to rebuild that country. *See Acree*, 370 F.3d at 62 (Roberts, C.J., concurring) ("One need look no further than the title of the EWSAA to discern its emergency nature."). That interim measure was Section 1503 of the EWSAA, which gave the President the authorities he needed to exempt Iraq from provisions of law applicable to countries that have supported terrorist states *for a period of 18 months*—by which time, Congress reckoned, conditions on the ground would be such as to permit the Secretary of State to remove Iraq from the terrorism list.

As history would have it, the Secretary rescinded Iraq's designation as a terrorist state in October 2004—eleven months before the expiration of Section 1503's sunset date (as extended by the ESAADRIA). As the Secretary's act rendered superfluous the President's May 2003 order exempting Iraq from the various provisions of law that restrict aid to and commerce with terrorist

countries, Congress was able to allow the sunset date to come and go without any consequence insofar as those provisions were concerned. Presidential Determination No. 2003-23, 68 Fed. Reg. 26,459 (May 16, 2003). That, however, was not at all the case with regard to Section 1605(a)(7) of the FSIA. Unlike statutory provisions that address aid and trade with terrorist countries, jurisdiction under Section 1605(a)(7) depends not on a foreign state's current designation as a sponsor of terrorism, but on its designation at the time of the terrorist act upon which a plaintiff's claim is based. 28 U.S.C. § 1605(a)(7)(A). Thus, to the extent that Section 1503 ever applied to Section 1605(a)(7), the lapse of presidential authority to make that provision inapplicable to Iraq resulted in the restoration of jurisdiction over that country.

That the sunset provision would have that effect is something about which *all three judges* on the *Acree* panel agreed. For instance, in his majority opinion, Judge Edwards stated that, if the United States' position were correct, jurisdiction over Iraq would "again be available" if and when the period specified in Section 1503's sunset provision elapsed—a result he characterized as "bizarre." 370 F.3d at 57.

Likewise, in his concurring opinion, Chief Justice Roberts wrote that Section 1605(a)(7) of the FSIA, as well as all other provisions of law that the President had made "inapplicable as to Iraq," would "return to full strength" upon expiration of the sunset provision. *Id.* at 62. Unlike the majority, however, Chief Justice Roberts found nothing

bizarre about this result because he viewed the sunset provision as an attempt "to buy [Congress] time for fuller consideration of the issues" and he thought it unlikely that "the majority's prediction of abject congressional lassitude" would turn out to be "accurate." *Id.*

In fact, history has demonstrated that Congress acted responsibly in extending the sunset provision by one year in November 2003—a period that proved more than sufficient in giving the Secretary of State the time he would need to remove Iraq from the terrorism list. However, once the Secretary had taken that action, Congress had no further need to extend the authorities contained in Section 1503. This inaction caused the sun to set on all such authorities on September 30, 2005.

In their briefs in this Court, both the United States and Iraq argue that this passing of the sunset is of no moment because the President's exercise of his authority to make provisions of law that apply to countries that have supported terrorism inapplicable to Iraq has "a *permanent* effect." (United States *Amicus* Brief at 19 (emphasis in original); *see also* Petitioners' Brief at 33.) Intrinsic to this interpretation of the EWSAA is the unstated, but necessary, proposition that authorities that have been delegated to the Executive Branch by Congress can somehow outlast the statute that is the source of such delegation.

Neither the United States nor Iraq cites a single case in support of this dubious proposition for the reason that no such case exists. *See United States v.*

Quinn, 401 F. Supp. 2d 80, 93 n.10 (D.D.C. 2005) (noting that "the Court could not locate a pertinent case outside the realm of trade embargos" under the Export Administration Act in which "the statute underlying the regulations lapsed and the regulations nonetheless continued in force"). In fact, the governing principle is just the opposite. Absent some intervening circumstance—not present here—"a statutory lapse . . . leave[s] the implementing regulations without a legislative foundation on which to stand," *id.* at 93, for, as this Court has repeatedly affirmed, a regulation that "operates to create a rule out of harmony with the statute" under which it was promulgated "is a mere nullity." *Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 134 (1936); *see also United States v. Larionoff*, 431 U.S. 864, 873 (1977) ("regulations, in order to be valid[,] must be consistent with the statute under which they are promulgated").

Research has revealed just a single line of cases in which the courts have been called upon to address the effect of the expiration of statutory authority on regulations promulgated pursuant to that authority. All of these cases have arisen in the context of congressional failure to extend the sunset provision in the Export Administration Act, 50 U.S.C. app. § 2401-20 (the "EAA"), and they demonstrate that the novel view of delegated executive power that the United States is advancing here is incorrect.

Like the EWSAA, the EAA—which authorizes the President to regulate the export of goods in furtherance of U.S. national security, foreign policy and economic interests—contains a provision

terminating "[t]he authority granted by this Act" on a specified date. 50 U.S.C. app. § 2419. Since the passage of the EAA in 1979, Congress has permitted this authority to lapse on no less than six occasions. *Wisconsin Project on Nuclear Arms Control v. U.S. Dep't of Commerce,* 317 F.3d 275, 278 (D.C. Cir. 2003). And, on each such occasion, the President responded by declaring a national emergency and invoking his alleged authority under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 and 1702 ("IEEPA"), to rescue the regulatory regime that had been established under the EAA. *Wisconsin Project*, 317 F.3d at 278.

Implicitly acknowledging that the effect of the expiration of that statute would be to render all regulations promulgated thereunder a nullity, each of these executive orders has provided that "[a]ll rules and regulations issued . . . under the authority of the [EAA], as amended, . . . shall . . . remain in full force and effect as if issued or taken pursuant to" the President's authority under IEEPA. 49 Fed. Reg. 13099 (Executive Order 12470 of Mar. 30, 1984); *see also* 66 Fed. Reg. 44025 (Executive Order No. 13222 of Aug. 17, 2001). Furthermore, in each of the cases involving post-sunset date challenges to these rules and regulations, the courts have held that the issue of their validity turned "solely upon the President's exercise of his powers under IEEPA." *United States v. Mechanic,* 809 F.2d 1111, 1113 (5th Cir. 1987); *see also Times Publishing Co. v. U.S. Dep't of Commerce*, 236 F.3d 1286, 1291 (11th Cir. 2001); *United States v. Spawr Optical Research, Inc.*, 685 F.2d 1076, 1078 (10th Cir. 1982) (stating that, in view of expiration of the statutory predecessor to the

EAA, the "sole basis" for regulations restricting export of goods to the former Soviet Union was an executive order purporting to extend them under the Trading With The Enemy Act); *Quinn*, 401 F. Supp. 2d at 93. To put it another way, had the President not rescued them by invoking his authority under IEEPA, all of the rules and regulations that had earlier been issued pursuant to the EAA would have lapsed when that statute's sunset provision took effect.

The implications of a construction of the EWSAA that would depart from the bedrock principle that delegated authorities expire with the statute that is their source are both dangerous and absurd. In the same determination in which he purportedly placed Iraq beyond the reach of Section 1605(a)(7) of the FSIA, President Bush also declared Section 620A of the Foreign Assistance Act and all other provisions of law restricting aid to and trade with state-sponsors of terrorism "inapplicable with respect to Iraq." 68 Fed. Reg. 26,459. If the United States' interpretation of the EWSAA is correct, Iraq's exemption from every one of these provisions is permanent and, since all of the authorities that Section 1503 granted the President have expired, that exemption can no longer be undone through executive action. In other words, as the United States would have it, Iraq enjoys a privileged status among the countries of the world: it is the only one that can sponsor acts of international terrorism without triggering the various provisions of U.S. law that authorize or compel the President to protect our country from such conduct.

The notion that Congress intended to enable the President to exempt Iraq from these provisions *in perpetuity* when it enacted the EWSAA in April 2003 is farfetched. At that point in time, the Ba'athist regime in Iraq had not yet surrendered and there was no guarantee that the regime that would ultimately replace it would not itself degenerate into a state sponsor of terrorism. Indeed, with American combat forces due to withdraw from Iraq within the next 18 months, the possibility remains that Iraq could eventually fall in the hands of insurgent forces that support international terrorism.

Yet, under the short-sighted interpretation of Section 1503 that the United States is promoting here, in the unfortunate event that such forces were to take power in Iraq and, upon having done so, to launch a concerted terrorist campaign against U.S. interests around the world, the President would be powerless to take immediate action. Rather, he would be required to wait for Congress to pass a new statute making applicable to Iraq all of the provisions of law that President Bush supposedly made permanently inapplicable to that country some six years ago. Given the availability of an alternative and more plausible reading of Section 1503, this Court should not construe that provision in a manner that would produce such an absurd and obviously unintended result. *See, e.g., Griffin v. Oceanic Contractors*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"); *Atchison, T. & S. F. R. Co. v. United States*, 295 U.S. 193, 208 (1935).

Beyond its unintended, absurd and highly undesirable policy consequences, the United States' view that, once invoked by the President, the authorities contained in Section 1503's second proviso exist in perpetuity cannot be reconciled with its far more sensible view regarding the temporal scope of the authorities contained in that section's fourth and fifth provisos. Like Section 1503's second proviso, these provisos make certain provisions of law inapplicable with regard to Iraq.[5] In its *amicus* brief, the United States admits (at 20) that it was necessary for Congress to include a provision in the ESAADRIA extending the authorities referenced in Section's 1503's fourth and fifth provisos in order that they "would remain inapplicable [to Iraq] 'through fiscal year 2005.'" The United States argues (at 20), however, that this extension was not needed to ensure that the provisions of law that the President ordered "inapplicable to Iraq" pursuant to his authority under Section 1503 remained "inapplicable" to that country, because, once exercised, that authority had "a permanent effect."

The distinction the United States draws between Section 1503's second proviso and its fourth and fifth provisos finds absolutely no support in the statutory language. All three provisos are "authorities" that make certain provisions of law inapplicable to Iraq.

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[5] By its terms, the fourth proviso provides that "section 307 of the Foreign Assistance Act of 1961 shall not apply with respect to programs of international organizations for Iraq." Pub. L. No. 108-011, § 1503, 117 Stat. 559, 579. Similarly, the fifth proviso states that "provisions of law that direct the United States Government to vote against or oppose loans or other uses of funds . . . in international financial institutions for Iraq shall not be construed as applying to Iraq." *Id.*

The sole difference between them is that the second proviso requires presidential action to bring about this result, while the fourth and fifth ones are self-executing. It is, of course, a basic rule of statutory construction that "'identical words used in different parts of the same act"—to say nothing of words used in the same section—"are intended to have the same meaning.'" *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986) (quoting *Helvering v. Stoçkholms Enkilda Bank*, 293 U.S. 84, 87 (1934)). Thus, if as the United States admits, the authorities contained in the fourth and fifth provisos of Section 1503 do not outlast the sunset provision, then the same must be true of the authorities contained in that section's second proviso.[6]

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[6] The United States seeks to defeat this logic by pointing to a sentence from the Joint Explanatory Statement attached to the Conference Report to the ESAADRIA, which describes Presidential Determination 2002-23 as having "ma[d]e *permanently* inapplicable to Iraq any provisions of law that apply to countries that support terrorism." H.R. Conf. Rep. No. 337, 108th Cong., 1st Sess. 59 (2003) (emphasis added). This legal opinion, which somehow found its way into a committee report to a subsequently enacted statute, is hardly an authoritative interpretation of the meaning of the EWSAA. When Congress passed that statute in April 2003, it voted only for its bare legislative text, which, as set forth above, contains no linguistic basis for finding a temporal distinction between Section 1503's second proviso and its fourth and fifth ones. In such circumstances, adding an omitted word—"permanently"—into Section 1503 of the EWSAA because of a single isolated comment in the legislative history to an amendment that was enacted six months later would be entirely inappropriate. *See, e.g., Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 699, n.3 (2003) (noting that "a stray comment in a congressional report stands a long way from" (and "cannot make up for the absence of") "express statutory language"); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512 , 550 (1982) (Powell,

The United States points out (at 20) that if the second proviso is not read to have permanent effect, then neither can Section 1503's principal clause, which gives the President the authority to "suspend the application of any provision of the Iraq Sanctions Act of 1990," Pub. L. No. 101-513, 104 Stat. 1979, 2047 (the "ISA")—something that the United States regards as implausible since "Congress never repealed the ISA" and the Commerce Department "continues to permit export to Iraq of items that would not be permitted" if the ISA were still effective. The United States' argument cannot be squared with Section 1503's use of the word "suspend"—the plain meaning of which is "to stop *temporarily*." Webster's New Twentieth Century Dictionary (2nd ed. 1966) (emphasis added). Leaving that inconvenient fact aside, the United States' argument also ignores the fact that, by its terms, the ISA gives the President the authority to terminate the trade embargo against Iraq, 101 P.L. 513, §§ 586C(c), and to waive any or all of the other sanctions specified in that act upon his determination that the conditions giving rise to their imposition no longer exist. *Id.* §§ 586H. To the extent, however, that one or more of those sanctions were not waivable, the fact that Congress may have neglected to act by repealing the ISA is hardly evidence of its intent to delegate to the President the authority to repeal that statute himself when it passed the EWSAA in April 2003.

J., dissenting) ("when critical words . . . are absent from a statute and its meaning is otherwise clear, reliance on legislative history to add omitted words is rarely appropriate").

B. Even If Congressional Intent Regarding Application Of The Sunset Provision Were Unclear, That Provision Must Be Construed As Applying To The Authorities Contained In Section 1503 In Order To Avoid Grave Constitutional Questions In Regard To The Separation Of Powers.

The United States' attempt to construe the EWSAA as a delegation of congressional authority to, in effect, repeal the ISA—and, by necessary extension to amend Section 1605(a)(7) of the FSIA—cannot stand. As this Court acknowledged when it invalidated the Line Item Veto Act in *Clinton v. New York*, 524 U.S. 417 (1998), "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Id.* at 438. "Instead, this legislative power is vested exclusively in Congress, and the exercise of such legislative power must follow the procedures set forth in the Constitution" and its Presentment Clause. *Terran v. Secretary of Health and Human Services*, 195 F.3d 1302, 1312 (Fed. Cir. 1999); *see also Clinton*, 524 U.S. at 448-49; *INS v. Chadha*, 462 U.S. 919, 954 1983("Repeal of statutes, no less than enactment, must conform with Art. I" of the Constitution.); *United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 14 (1st Cir. 2005) ("to permit an agency by its actions to repeal an act of Congress . . . would pose grave constitutional questions of violation of separation of powers").

In his concurring opinion in *Acree*, Chief Justice Roberts rejected the argument that Section 1503 is an unconstitutional delegation of legislative power—

reasoning that the authorities it confers upon the President are "akin to waivers that the President is routinely empowered to make in other areas." 370 F.3d at 64 n.3. In making this analogy, Chief Justice Roberts was, as set forth above, acting on the assumption that presidential authority to exempt Iraq from provisions of law applicable to terrorist countries would lapse with the passing of the sunset provision. If, however, that authority is regarded as lasting in perpetuity, the analogy to a presidential waiver breaks down.

As this Court has repeatedly held, if Congress wishes to delegate its authority to the President or some other executive official in a manner that passes constitutional muster, it "must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). By its express terms, Section 1503 does not establish any such "intelligible principle" to which the President's actions were required to conform. However, as his formal message to Congress explaining the rationale for his determination exempting Iraq from terrorism laws makes clear, implicit in the delegation of authority contained in Section 1503 was the requirement that the President determine any such exemption to be in the interest of the national security of the United States.[7]

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[7] *Message to the Congress Reporting the Declaration of a National Emergency with Respect to the Development Fund for Iraq*, 39 Weekly Comp. Pres. Doc. 647, 647-648 (May 26, 2003) (noting that pursuit of terrorism lawsuits against Iraq

Indeed, no other interpretation of Section 1503 is possible, for if that section were construed as allowing the President to waive the application of statutory provisions without limit, it would clearly constitute an unconstitutional delegation of legislative power.

Inasmuch as the President's authority to exempt Iraq from provisions of law applicable to terrorist states is cabined by the requirement that he determine (in his admittedly unreviewable discretion) such exemption to be in the interest of national security, it must be the case that he can keep that waiver in place only so long as that remains his determination. If, for example, prior to the expiration of the sunset provision, the President had determined that the exemption he had granted Iraq was no longer consistent with U.S. national security interests, he would have been obliged to lift that exemption. Thus, by its nature, the authority contained in Section 1503's second proviso is temporary in nature.

Under the United States' interpretation of the EWSAA, however, Congress delegated to the President the authority to keep Iraq's exemption from provisions of law otherwise applicable to terrorist states in place, even if he determines that such exemption is *contrary* to the national security interest. Indeed, under the United States' interpretation, once the sun set on Section 1503's authorities, the President would be *unable* to lift Iraq's exemption, despite his view that it was

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threatens "the national security and foreign policy of the United States").

undermining U.S. security interests. In other words, because all of the authorities that Section 1503 gave the President would have expired with the sunset, the only way to make provisions of law applicable to terrorist countries re-applicable to Iraq would be for Congress to enact new legislation withdrawing Iraq's exemption.[8] Accordingly, under the United States' interpretation, the delegation of authority contained in Section 1503 was tantamount to an authority to rewrite every law applicable to countries that have supported terrorism to say "except Iraq."

It is a cardinal principle of statutory construction that where a proffered construction of a statute "raise[s] serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also United States v. Jin Fuey Moy*, 241 U.S. 394,

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[8] Any authority the President might have to undo Iraq's exemption would have to be implied by statute or be inherent to his office. Since the passing of Section 1503's sunset date, there is no basis for finding any such authority implied under the EWSAA. And, to the extent the President's inherent powers over foreign affairs might give him the authority to make provisions of law applicable to terrorist states re-applicable to Iraq—a dubious proposition—he plainly has no inherent power to define the jurisdiction of U.S. courts and, hence, to make Section 1605(a)(7) of the FSIA re-applicable to Iraq. *See, e.g., Palmore v. United States*, 411 U.S. 389, 40 (1973); *Glidden Co. v. Zdanok*, 370 U.S. 530, 551 (1962); *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943); *Electronic Data Sys. Corp. v. Social Security Org. of Iran*, 508 F. Supp. 1350 (N.D. Tex.), *aff'd in part and vacated in part*, 651 F.2d 1007 (5th Cir. 1981).

401 (Holmes, J.) ("[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score"). Construing the authority Section 1503 gives the President to exempt Iraq from our terrorism laws as being contingent on his determination that such exemption is in our national security interest and as lasting no longer than the date set forth in that section's sunset provision is not "plainly contrary to the intent of Congress." In fact, it is precisely what Congress intended and, hence, it is the interpretation that must prevail in this case.

II. Absent An Unmistakably Clear Statement Of Congressional Intent—Of Which There Is None—Section 1503 Of The EWSAA Cannot Be Construed As Impliedly Amending Section 1605(a)(7) Of The FSIA.

For the reasons set forth above and in Respondents' brief, when read in its context and in light of the statutory purpose, Section 1503's second proviso was clearly intended to give the President the authority to temporarily exempt Iraq from laws, which, like Section 620A of the Foreign Assistance Act, restrict aid to and commerce with terrorist countries. At a minimum, however, even if Section 1503 could plausibly be construed as applying to Section 1605(a)(7) of the FSIA, that construction is, as Chief Justice Roberts himself acknowledged in his concurrence in *Acree*, neither unequivocally clear from, nor unavoidably required by, the statutory text. 370 F.3d at 62 ("I agree with the majority that this question of statutory interpretation is close, and I do not suggest that the EWSAA is entirely

unambiguous."). That admission dictates the result here because a clear and unmistakable expression of congressional intent is required in order for Section 1503 of the EWSAA to be construed as amending the jurisdictional grant contained in Section 1605(a)(7) of the FSIA.

It is a venerable rule of statutory construction—overlooked by both the majority and the concurring opinions in *Acree*— that "repeals by implication are not favored." *National Ass'n of Homebuilders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007); *see also United States v. Borden Co.*, 308 U.S. 188, 198 (1939). This doctrine "applies with even greater force when," as here, "the claimed repeal rests solely upon an Appropriations Act." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978).

Before joining this Court, Justice Scalia explained that a "steady adherence" to the presumption against implied repeal:

> is important, primarily to facilitate not the task of judging but the task of legislating. It is one of the fundamental ground rules under which laws are framed. Without it, determining the effect of a bill upon the body of preexisting law would be inordinately difficult, and the legislative process would become distorted by a sort of blind gamesmanship, in which members of Congress vote for or against a particular measure according to their varying estimations of whether its implications will

be held to suspend the effects of an earlier law that they favor or oppose.

United States v. Hansen, 772 F.2d 940, 944 (D.C. Cir. 1985); see also *Regional Rail*, 419 U.S. at 134. As "[e]very amendment of a statute effects a partial repeal," this rationale is no less applicable to implied amendments than it is to implied repeals and, hence, this Court has "repeatedly recognized that implied amendments are no more favored than implied repeals." *Homebuilders*, 127 S. Ct. at 2533 n. 8; *see also Regional Rail*, 419 U.S. 102, 134 (1974); *United States v. Welden*, 377 U.S. 95, 103 n. 12 (1964).

Consistent with this principle, a legislative intention to repeal or amend a prior statute will be found only were such intention is "clear and manifest." *Homebuilders*, 127 S. Ct. at 2532 (2007); *see also Watt v. Alaska*, 451 U.S. 259, 267 (1981)); *Borden*, 308 U.S. at 199. Thus, this Court "will not infer a statutory repeal 'unless the later statute expressly contradict[s] the original act' or unless such a construction 'is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.'" *Homebuilders*, 127 S. Ct. at 2532 (quoting *Traynor v. Turnage*, 485 U.S. 535, 548 (1988)). In other words, absent express statutory language referencing the earlier statute, "'[a] new statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled.'" *Regional Rail*, 419 U.S. at 133; *see also Borden*, 308 U.S. at 199; *Hansen*, 772 F.2d at 994.

By its terms, Section 1503's second proviso expressly applies to a single provision of law—Section 620A of the Foreign Assistance Act. Accordingly, that proviso can be construed as amending Section 1605(a)(7) of the FSIA to create an exemption for Iraq only if the conflict between these two provisions is irreconcilable. Such "positive repugnancy" exists between the words in Section 1503's second proviso and the various provisions of law that restrict aid to and commerce with terrorist countries. If Section 1503 were construed as not reaching those provisions, the phrase "any other provision of law that applies to countries that have supported terrorism" would have absolutely "no meaning at all."

By contrast, none of the judges on the *Acree* panel—Chief Justice Roberts included—thought that the words "any other provision of law" in Section 1503 of the EWSAA express an unmistakably clear congressional command to amend the jurisdictional grant contained in Section 1605(a)(7) of the FSIA to create an exception for Iraq. Indeed, citing the time-honored presumption against implied repeals, this Court has found that the use of similar words did not constitute the kind of "unambiguous statutory directive" needed to effect a limitation on habeas jurisdiction. *INS v. St. Cyr*, 533 U.S. 289, 299, 312 (2002) (holding that statutory language, which barred judicial review of final orders of deportation "notwithstanding any other provision of law," did "not speak[] with sufficient clarity to bar jurisdiction pursuant to the general habeas statute").[9]

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[9] *See also Calcano-Martinez v. INS*, 232 F.3d 328, 338-39 (2d Cir. 2000) (holding that "notwithstanding any other provision

Likewise, in these cases, Section 1503's second proviso does not constitute the kind of unmistakable congressional command that would be necessary to limit jurisdiction under Section 1605(a)(7) of the FSIA. That proviso would have ample meaning if, consistent with the underlying statutory purpose, it were construed as giving the President authority to remove the aid and trade barriers to the rebuilding effort that were posed by Iraq's designation as a terrorist state. In other words, Section 1503 of the EWSAA and section 1605(a)(7) are "capable of coexistence" and, hence, it is the duty of this Court "to regard each as effective." *Regional Rail*, 419 U.S. at 133-34.

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of law" language in § 242(a)(2)(C) of the Immigration and Nationality Act was "not strong enough" to repeal habeas jurisdiction because it did "not explicitly mention the jurisdictional statute or the general type of jurisdiction by name"); *Sandoval v. Reno*, 166 F.3d 225, 232 (3d Cir. 1999) (stating that "courts should not lightly presume that a congressional enactment containing general language effects a repeal of a jurisdictional statute" and "that only a plain statement of congressional intent to remove a particular statutory grant of jurisdiction will suffice").

CONCLUSION

For all of the foregoing reasons, the decision of the Court of Appeals should be affirmed and the cases remanded for further proceedings.

Respectfully submitted,

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